CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 29 NOVEMBER 15, 1995 NO. 46

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 95–89)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR OCTOBER 1995

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: Monday, October 9, 1995.

Greece drachma:

October 1, 1995	$0.004289
October 2, 1995	.004302
October 3, 1995	.004256
October 4, 1995	.004282
October 5, 1995	.004287
October 6, 1995	.004264
October 7, 1995	.004264
October 8, 1995	.004264
October 9, 1995	.004264
October 10, 1995	.004273
October 11, 1995	.004258
October 12, 1995	.004278
October 13, 1995	.004268
October 14, 1995	.004268
October 15, 1995	.004268
October 16, 1995	.004294
October 17, 1995	.004304
October 18, 1995	.004282
October 19, 1995	.004311
October 20, 1995	.004339
October 21, 1995	.004339
October 22, 1995	.004339
October 23, 1995	.004350
October 24, 1995	.004350
October 25, 1995	.004333
October 26, 1995	.004291
October 27, 1995	.004319
October 28, 1995	.004319
October 29, 1995	.004319
October 30, 1995	.004320
October 31, 1995	.004309

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for October 1995 (continued):

South Korea won:

October 1, 1995	$0.001302
October 2, 1995	.001301
October 3, 1995	.001301
October 4, 1995	.001303
October 5, 1995	.001300
October 6, 1995	.001301
October 7, 1995	.001301
October 8, 1995	.001301
October 9, 1995	.001301
October 10, 1995	.001300
October 11, 1995	.001302
October 12, 1995	.001302
October 13, 1995	.001301
October 14, 1995	.001301
October 15, 1995	.001301
October 16, 1995	.001301
October 17, 1995	.001303
October 18, 1995	.001304
October 19, 1995	.001305
October 20, 1995	.001304
October 21, 1995	.001304
October 22, 1995	.001304
October 23, 1995	.001306
October 24, 1995	.001306
October 25, 1995	.001307
October 26, 1995	.001306
October 27, 1995	.001305
October 28, 1995	.001305
October 29, 1995	.001305
October 30, 1995	.001307
October 31, 1995	.001307

Taiwan N.T. dollar:

October 1, 1995	$0.036941
October 2, 1995	.037175
October 3, 1995	.037369
October 4, 1995	.037230
October 5, 1995	.037300
October 6, 1995	.037161
October 7, 1995	.037161
October 8, 1995	.037161
October 9, 1995	.037161
October 10, 1995	.037175
October 11, 1995	.037161
October 12, 1995	.037161
October 13, 1995	.037175
October 14, 1995	.037175
October 15, 1995	.037175
October 16, 1995	.037133
October 17, 1995	.037078
October 18, 1995	.037092
October 19, 1995	.037037
October 20, 1995	.037051
October 21, 1995	.037051
October 22, 1995	.037051
October 23, 1995	.037106

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for October 1995 (continued):

Taiwan N.T. dollar (continued):

October 24, 1995	$0.037133
October 25, 1995	.037133
October 26, 1995	.037092
October 27, 1995	.037092
October 28, 1995	.037092
October 29, 1995	.037092
October 30, 1995	.037037
October 31, 1995	.037051

Dated: November 1, 1995.

FRANK CANTONE,
Chief,
Customs Information Exchange.

(T.D. 95–90)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR OCTOBER 1995

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 95–82 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: Monday, October 9, 1995.

India rupee:

October 20, 1995	$0.028050
October 21, 1995	.028050
October 22, 1995	.028050
October 23, 1995	.028050

Mexico peso:

October 10, 1995	$0.146199
October 11, 1995	.148148
October 13, 1995	.148368
October 14, 1995	.148368
October 15, 1995	.148368
October 16, 1995	.148214
October 17, 1995	.147929
October 24, 1995	.147820
October 25, 1995	.147275
October 26, 1995	.143678

Foreign Currencies—Variances from quarterly rates for October 1995 (continued):

Mexico peso (continued):	
October 27, 1995	$0.140252
October 28, 1995	.140252
October 29, 1995	.140252
October 30, 1995	.144509
October 31, 1995	.139860
Sweden krona:	
October 25, 1995	$0.151412
October 27, 1995	.151378
October 28, 1995	.151378
October 29, 1995	.151378

Dated: November 1, 1995.

FRANK CANTONE,
Chief,
Customs Information Exchange.

(T.D. 95–91)

LICENSE CANCELLATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 111.51(a), the following Customs broker license has been cancelled due to the death of the broker. This license was issued in the Norfolk port.

Customs broker	*License No.*
James A. Ryan	10114

Dated: October 19, 1995.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, November 7, 1995 (60 FR 56186)]

(T.D. 95–92)

LICENSE CANCELLATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 111.51(a), the following Customs broker license has been cancelled due to the death of the broker. This license was issued in the Los Angeles district.

Customs broker	*License No.*
John G. Leitch	10757

Dated: October 19, 1995.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, November 7, 1995 (60 FR 56186)]

(T.D. 95–93)

RETRACTION OF REVOCATION NOTICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: The following Customs broker license number was erroneously included in a list of revoked Customs brokers licenses in the Customs Bulletin.

Customs broker	*License No.*
Edward Pluemer	7652

License 7652, issued in the Port of Chicago, remains a valid license.

Dated: November 1, 1995.

PHILIP METZGER
Director
Trade Compliance

[Published in the Federal Register, November 7, 1995 (60 FR 56186)]

(T.D. 95–94)

RETRACTION OF REVOCATION NOTICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: The following Customs broker license number was erroneously included in a list of revoked Customs brokers licenses in the Customs Bulletin.

Customs broker	*License No.*
Gulshan Kala	10188

License 10188, issued in the Houston-Galveston port, remains a valid license.

Dated: November 1, 1995.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, November 7, 1995 (60 FR 56186)]

(T.D. 95–95)

RETRACTION OF REVOCATION NOTICE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: The following Customs broker license number was erroneously included in a list of revoked Customs brokers licenses in the Customs Bulletin.

Customs broker	*License No.*
Robert Powers	13319

License 13319, issued in the Port of Savannah, remains a valid license.

Dated: November 1, 1995

PHILIP METZGER
Director
Trade Compliance

[Published in the Federal Register, November 7, 1995 (60 FR 56186)]

(T.D. 95–96)

ANNUAL USER FEE FOR CUSTOMS BROKER PERMIT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of due date for broker user fee.

SUMMARY: This is to advise Customs brokers that for 1996 the annual user fee of $125 that is assessed for each permit held by an individual, partnership, association or corporate broker is due by January 16, 1996. This announcement is being published to comply with the Tax Reform Act of 1986.

DATE: Due date for fee: January 16, 1996.

FOR FURTHER INFORMATION CONTACT: Gary Rosenthal, Entry, (202) 927–0380.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub.L. 99–272) established that an annual user fee of $125 is to be assessed for each Customs broker permit held by an individual, partnership, association, or corporation. This fee is set forth in the Customs Regulations in section 111.96 (19 CFR 111.96).

Section 111.96, Customs Regulations, provides that the fee is payable for each calendar year in each Broker district where the broker was issued a permit to do business by the due date which will be published in the Federal Register annually. Broker districts are defined in the General Notice published in the Federal Register, Volume 60, No. 187, Wednesday, September 27, 1995.

Section 1893 of the Tax Reform Act of 1986 (Pub. L. 99–514), provides that notices of the date on which a payment is due of the user fee for each broker permit shall be published by the Secretary of the Treasury in the Federal Register by no later than 60 days before such due date. This document notifies brokers that for 1996, the due date for payment of the user fee is January 16, 1996. It is expected that annual user fees for brokers for subsequent years will be due on or about the third of January of each year.

Date: November 1, 1995.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, November 7, 1995 (60 FR 56117)]

19 CFR Parts 10, 12, 102, and 178

(T.D. 95–69)

RIN 1515–AB71

RULES OF ORIGIN FOR TEXTILE AND APPAREL PRODUCTS; CORRECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; corrections.

SUMMARY: This document corrects a final rule document which amended the Customs Regulations to set forth provisions governing the determination of the country of origin of textile and apparel products for purposes of laws enforced by the Customs Service. The corrections involve two erroneous regulatory text citations.

EFFECTIVE DATE: These corrections are effective October 5, 1995.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On September 5, 1995, Customs published T.D. 95–69 in the Federal Register (60 FR 46188) containing final amendments to the Customs Regulations to set forth standards governing the determination of the country of origin of textile and apparel products for purposes of laws enforced by Customs. The regulatory amendments primarily implemented the provisions of section 334 of the Uruguay Round Agreements Act (Public Law 103–465, 108 Stat. 4809) and included a new § 102.21 covering the majority of the section 334 provisions as well as new §§ 10.25 and 10.195(d) which concerned duty treatment accorded to imported articles incorporating textile components cut to shape in the United States. This document corrects the texts of §§ 10.25 and 10.195(d) which each contained an erroneous cross-reference to the definition of "textile or apparel product" in § 102.21.

CORRECTIONS OF PUBLICATION

The document published in the Federal Register as T.D. 95–69 on September 5, 1995 (60 FR 46188) is corrected as set forth below.

1. On page 46196, in the third column, in § 10.25(a), the reference "§ 102.21(b)(4)" is corrected to read "§ 102.21(b)(5)".

2. On page 46197, in the second column, in § 10.195(d), the reference "§ 102.21(b)(4)" in the last sentence is corrected to read "§ 102.21(b)(5)".

Dated: October 31, 1995.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Federal Register, November 6, 1995 (60 FR 55995)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, October 31, 1995.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Director,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTER RELATING TO CLASSIFICATION OF A REVERSIBLE JACKET

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a reversible jacket. Notice of the proposed revocation was published September 27, 1995, in the CUSTOMS BULLETIN. No comments were received in response to the notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 16, 1996.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Classification Branch, (202–482–7094).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a reversible jacket. The garment was classified as a men's woven cotton jacket of subheading 6201.92, Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in District Decision (DD) 810957 of June 2, 1995. After issuance of the ruling, Customs was informed by the importer of an error in the initial ruling request. The importer had indicated the garment is a men's jacket when in fact, it is a women's jacket. Due to this error, the importer requested modification of DD 810957. As the difference in gender so changes the classification, Customs has chosen to revoke DD 810957.

Headquarters Ruling Letter 958253 revoking DD 810957 is set forth as an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: October 20, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, October 20, 1995.

CLA–2 R:C:T 958253 CMR
Category: Classification
Tariff No. 6202.92.1500 and 6202.92.2061

MS. HOLLY BROWN
NORDSTROM, INC.
1321 Second Avenue
Seattle, WA 98101

Re: Revocation of District Decision (DD) 810957 of June 2, 1995; classification of a reversible jacket; men's v. women's.

DEAR MS. BROWN:

This is in response to your request of June 16, 1995, that Customs amend DD 810957 of June 2, 1995, classifying a reversible jacket as a men's garment. Your request and a sample garment were received by this office. After review, Customs agrees with your request DD 810957 is being revoked for the reasons stated herein.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of DD 810957 was published September 27, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 39.

Facts:

The garment at issue, style W2250JW021, is a reversible jacket with one outer shell of 100 percent cotton woven fabric and the other outer shell is of 100 percent polyester knit fabric. (We note the submitted sample had only one label indicating "100% cotton, Made in Hong Kong".) The cotton woven shell is indicated as treated for water resistance. The garment features a full front opening with a reversible zipper for closure, pockets at the waist on both sides, rib knit cuffs and a rib knit bottom. The submitted sample is a size medium and the garment will be imported in sizes XS-XL.

In your May 23, 1995, letter requesting the initial classification ruling letter, you indicated that the subject garment was a men's garment. You are requesting modification of DD 810957 because after receiving the ruling, you were informed that the subject jacket is a women's garment. You indicate in your June 16th letter that the garment will be made in women's sizes and sold in with other women's apparel.

Issue:

Is the subject jacket, style W2250JW021, classifiable as a men's or women's jacket?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [the remaining GRIs taken in order]."

As classification of the jacket as a cotton woven garment is not at issue, we will not set out the analysis upon which that decision is based, but only address the classification as a men's garment or a women's garment.

Note 8, Chapter 62, pertains to classification of garments by gender. That note states:

> Garments of this chapter designed for left over right closure at the front shall be regarded as men's or boys' garments, and those designed for right over left closure at the front as women's or girls' garments. These provisions do not apply where the cut of the garment clearly indicates that it is designed for one or other of the sexes.
>
> Garments which cannot be identified as either men's or boys' garments or as women's or girls' garments are to be classified in the headings covering women's or girl's' garments.

The reversible zipper closure precludes a gender determination based upon the direction of the closure. Thus, we must look to the cut of the garment. You have submitted a sizing chart for style W2250JW021 which indicates at the top of the chart that this garment is a Fall 95 women's jacket. You also submitted a sizing chart for a men's jacket, style 2250, which is the same style. A comparison of the sizing charts shows differences in the body length, sleeve length, back width and chest measurements. The body length, sleeve length and back width are greater for the men's jacket. The chest measurements were taken differently for each garment, so those number: do not lend themselves to easy comparison.

Based on the sizing information, style W2250JW021 is sized for women, i.e., it is sized smaller than a comparable men's jacket to accommodate the generally smaller frame of women.

Holding:

Style W2250JW021 is properly classified as a women's jacket. If the jacket passes the water resistance test, Additional U.S. Note 2, Chapter 62, the jacket is classified in subheading 6202.92.1500, HTSUSA, textile category 335, dutiable at 6.6 percent *ad valorem*. If the garment does not pass the water resistance test, the jacket is classified in subheading 6202.92.2061, HTSUSA, textile category 335, dutiable at 9.4 percent *ad valorem*.

DD 810957 is hereby revoked. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available **for inspection** at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(For John Durant, Director,
Tariff Classification Appeals Division.)

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ELECTRIC WINDOW REGULATORS

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of electric window regulators. Notice of the proposed revocation was published September 27, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 39.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 16, 1996.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Branch, Tariff Classification Appeals Division, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On September 27, 1995, Customs published a notice in the Custom Bulletin, Volume 29, Number 39, proposing to revoke New York Ruling Letter (NY) 804343, issued on November 30, 1994, concerning the tariff classification of electric window regulators, consisting of a motor and attached power-transmission arms, under subheading 8501.31.40, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other DC motors of an output exceeding 74.6 watts but not exceeding 735 watts. No comments were received.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NY 804343 to reflect the proper classification of the electric window regulators under subheading 8708.29.50, HTSUS, which provides for other accessories for motor vehicle bodies.

The window regulators are not simply electric motors and cannot be classified under heading 8501, HTSUS. Headquarters Ruling Letter 958351 revoking NY 804343 is set forth in an Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: October 27, 1995.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, October 27, 1995.

CLA–2 R:C:M 958351 LTO
Category: Classification
Tariff No. 8708.29.50

MS. DONNIE N. TURBERVILLE
BMW MANUFACTURING CORP.
P.O. Box 11000
Spartanburg, SC 29304–4100

Re: Electric window regulators; HQ 957575; NY 804343 *revoked.*

DEAR MS. TURBERVILLE:

This is in response to your letter of August 8, 1995, requesting the classification of an electric window regulator under the Harmonized Tariff Schedule of the United States (HTSUS). Specifically, you request that we reconsider NY 804343, dated November 30, 1994, in light of our decision in HQ 957575, which was published July 26, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 30. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY 804343 was published September 27, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 39.

Facts:

The articles in question are electric window regulators, which consist of a 90 Waft DC-motor and attached power-transmission arms. The window regulator is used to convert standard automobile windows to electric power windows.

Issue:

Whether the window regulators are classifiable as electric motors under heading 8501, HTSUS, or as parts of motor vehicles under heading 8708, HTSUS.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states, in pertinent part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

In NY 804343, issued to you on November 30, 1994, the electric window regulators were held to be classifiable under subheading 8501.31.40, HTSUS, which provides for other DC motors of an output exceeding 74.6 watts but not exceeding 735 watts. In HQ 957575, dated July 10, 1995, which was published on July 26, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 30, similar electric window regulators were classified under subheading 8709.20.50, HTSUS, which provides for other accessories for motor vehicle bodies (HQ 957575 modified NY 859234, dated May 8, 1991, wherein the electric window regulators had been classified as electric motors under heading 8501, HTSUS). For the reasons set forth in HQ 957575, the window regulators in question are also classifiable under subheading 8708.29.50, HTSUS, and NY 804343 is revoked.

Holding:

The electric window regulators are classifiable under subheading 8708.29.50, HTSUS, which provides for other accessories for motor vehicle bodies. The corresponding rate of duty for articles of this subheading is 3% *ad valorem*.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF TWO RULING LETTERS RELATING TO CLASSIFICATION OF WOMEN'S WOVEN BLOUSES WITH DETACHABLE COLLARS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying two rulings pertaining to the tariff classification of certain women's woven blouses with detachable collars. Notice of the proposed modification was published September 27, 1995, in the CUSTOMS BULLETIN. No comments were received in response to the notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 16, 1996.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese, Textile Classification Branch, (202–482–7094).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that customs is modifying two rulings pertaining to the tariff classification of certain women's woven blouses with detachable collars.

District Decision 810163 of June 2, 1995, and District Decision (DD) 809342 of May 18, 1995, differed in classification treatment of detachable collars imported with woven blouses. In DD 810163, one collar was classified with the blouse as a composite good, and the additional collar was separately classified. In DD 809342, the classification of the collars was not directly addressed, but it appears all were classified with the blouse as composite goods.

Customs believes only one detachable collar may be classified with the blouse in these cases because at that point the two items "form a whole". The additional collars are classified with the "whole", or composite, as part of a set. The full analysis is set forth in the attached modification ruling letters.

Headquarters Ruling Letters 958382 and 958386 modifying DD 810163 and DD 809342 are set forth in attachments "A" and "B" to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: October 27, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, October 27, 1995.

CLA–2 R:C:T 958382 CMR
Category: Classification
Tariff No. 6206.30.3040

MR. ROMMEL REDITO
THE APPAREL GROUP LTD.
1370 Avenue of the Americas
New York, NY 10019

Re: Modification of District Decision 810163 of June 2, 1995; classification of a woven blouse with two detachable collars; composite good; set.

DEAR MR. REDITO:

On June 2, 1995, Customs issued District Decision (DD) 810163 to you. In that ruling, Customs classified a women's woven blouse with two detachable collars as follows: the blouse and one collar were classified as a composite good; and, the other collar was separately classified. We have had occasion to review that ruling and found it to be partially in error. Therefore, we are taking this action to correct the error.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of DD 810163 was published September 27, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 39.

Facts:

The merchandise at issue, style 401136, consists of a women's woven blouse and two detachable collars. All three items are manufactured from 55 percent cotton/45 percent polyester woven fabric. The blouse features a band collar with five buttons sewn on the inside of the collar for attaching the detachable collars. The blouse also has long sleeves with button cuffs, a full front opening secured by six concealed buttons and one visible button, and a curved, hemmed bottom. The detachable collars each have five buttonholes that correspond to the buttons on the blouse collar. The merchandise is from Thailand.

Issue:

What is the proper classification of the woven blouse and two detachable collars?

Law and Analysis:

Classification of goods under the harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [the remaining GRIs taken in order]."

As stated above, we believe DD 810163 is only partially in error. Classification of the woven blouse and one detachable collar as a composite good is correct. The items meet the definition of a composite good provided by the Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System. Although not legally binding, the EN are the official interpretation of the tariff at the international level.

According to the EN, a composite good made up of different components includes:

> not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts

In this case, the blouse and each individual collar are separable components that are adapted to each other, are mutually complementary, and together form a whole that would normally not be sold as separate parts. Although the blouse is complete and is of a type that would be sold separately, the attachable collars clearly would not have any use without the blouse with which they were designed to be worn.

It is Customs view that the blouse and *one* collar form a composite good. The Explanatory Notes describe separable components of composite goods as "together forming a whole." In this case, one collar attached to the blouse forms a whole, i.e., a blouse with a pointed collar. The remaining collar is separate from "the whole".

Since only one collar may be classified with the blouse as a composite good, the classification of the second collar must be decided. It is here we believe we erred in DD 810163. In DD 810163 Customs classified the second collar separately under subheading 6217.10.9010, HTSUSA, as a clothing accessory. This office believes it is properly considered part of a set together with the composite article (blouse and one collar). In regard to goods put up in sets for retail sale, the Explanatory Notes defines sets as goods which:

> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking.

The composite blouse and collar are classifiable in heading 6206, HTSUSA, which is the classification heading applicable to the blouse. This is based on a determination that the blouse imparts the essential character to the composite. The extra collar is classifiable in heading 6217, HTSUSA. Following the definition of sets stated above, we have at least two articles (the composite blouse and extra collar) which are classifiable in different headings (6206 and 6217). The items are put together to meet a particular need, i.e., for the purpose of clothing a person, and they are put up in a manner suitable for sale directly to users with-

out repacking. We believe the blouse imparts the essential character to the set and thus, the set is classifiable under the provision applicable to the composite which is the heading for the woven blouse, heading 6206, HTSUSA.

Holding:

Based upon the above analysis, the woven blouse and two detachable collars are classified as a set consisting of a composite good (the blouse and one collar) and the remaining collar. As the woven blouse imparts the essential character of the composite, as well as the set, all items are classified with the blouse in subheading 6206.30.3040, HTSUSA, textile category 341, dutiable at 16.3 percent *ad valorem*. As part of a composite good, one collar is included with the blouse for textile category purposes.

If classified separately, the remaining collar would be classified as a clothing accessory of cotton, in subheading 6217.10.9010, HTSUSA, textile category 359. As part of a set, the remaining collar is subject to textile quota/visa restraints for category 359.

DD 810163 is modified to accord with the above. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available **for inspection** at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 27, 1995.

CLA–2 R:C:T 958386 CMR
Category: Classification
Tariff No. 6206.30.3040

MR. HERBERT J. LYNCH
SULLIVAN & LYNCH, P.C.
156 State Street
Boston, MA 02109–2508

Re: Modification of District Decision 809342 of May 18, 1995; classification of a woven blouse with three detachable collars; composite good; set.

DEAR MR. LYNCH:

On May 18, 1995, Customs issued District Decision (DD) 809342 to you as agent for Susan Bristol, Inc. In that ruling, Customs classified a women's woven blouse with three detachable collars. The ruling classified the blouse in subheading 6206.30.3010, Harmonized Tariff Schedule of the United Sates Annotated. The detachable collars were not specifically addressed in regard to their classification, thus it appears they were classified with the garment. We have had occasion to review DD 809342 and found it to be partially in error. Therefore, we are taking this action to correct the error.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Imple-

mentation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of DD 809342 was published September 27, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 39.

Facts:

The merchandise at issue, style 11657, misses size, consists of a women's woven blouse and three detachable collars. When imported in petite sizes the garment is designated style 21657; and, style 41621, when imported in women's sizes. The blouse is manufactured from 100 percent cotton woven blue denim fabric. The blouse extends to the vicinity of the hips and features a band collar with five buttons sewn on the inside of the collar for attaching the detachable collars. The blouse also has long sleeves with button cuffs, sleeve vents extending four and one-half inches from the ends of the sleeves, a full front opening secured by seven buttons, and a hemmed, generally straight bottom that dips somewhat at the front center to form two points.

The detachable collars each have five buttonholes that correspond to the buttons on the blouse collar. One collar is of the same blue denim fabric as the blouse. Another collar is of a plaid twill and the third is of a pinwale corduroy fabric. The base of each collar has five buttonholes that correspond to the buttons on the blouse and is of the same blue denim fabric as the blouse.

The merchandise is of Hong Kong origin.

Issue:

What is the proper classification of the woven blouse and three detachable collars?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [the remaining GRIs taken in order)."

As stated above, we believe DD 809342 is only partially in error. Classification of the woven blouse and one detachable collar as a composite good is correct. The items meet the definition of a composite good provided by the Explanatory Notes (EN) to the Harmonized Commodity Description and coding System. Although not legally binding, the EN are the official interpretation of the tariff at the international level.

According to the EN, a composite good made up of different components includes:

> not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

In this case, the blouse and each individual collar are separable components that are adapted to each other, are mutually complementary, and together form a whole that would normally not be sold as separate parts. Although the blouse is complete and is of a type that would be sold separately, the attachable collars clearly would not have any use without the blouse with which they were designed to be worn.

It is Customs view that the blouse and *one* collar form a composite good. The Explanatory Notes describe separable components of composite goods as "together forming a whole. In this case, one collar attached to the blouse forms a whole, i.e., a blouse with a pointed collar. The remaining collars are separate from "the whole".

Since only one collar may be classified with the blouse as a composite good, the classification of the remaining collars must be decided. It is here we believe we erred in DD 809342. In DD 809342, it appears Customs classified the remaining collars with the blouse as part of the composite good. This office believes the additional collars are properly considered part of a set together with the composite article (blouse and one collar). In regard to goods put up in sets for retail sale, the Explanatory Notes defines sets as goods which:

> (a) consist of at least two different articles which are, *prima facie,* classifiable in different headings;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking

The composite blouse and collar are classifiable in heading 6206, HTSUSA, which is the classification heading applicable to the blouse. This is based on a determination that the

blouse imparts the essential character to the composite. The extra collars are classifiable in heading 6217, HTSUSA. Following the definition of sets stated above, we have at least two articles (the composite blouse and extra collar) which are classifiable in different headings (6206 and 6217). The items are put together to meet a particular need, i.e., for the purpose of clothing a person, and they are put up in a manner suitable for sale directly to users without repacking. We believe the blouse imparts the essential character to the set and thus, the set is classifiable under the provision applicable to the composite which is the heading for the woven blouse, heading 6206, HTSUSA.

Holding:

Based upon the above analysis, the woven blouse and three detachable collars are classified as a set consisting of a composite good (the blouse and one collar) and the remaining collars. As part of a composite good, one collar is included with the blouse for textile category purposes.

If classified separately, the remaining collars would be classified as clothing accessories of cotton, in subheading 6217.10.9010, HTSUSA, textile category 359. As part of a set, the remaining collars are subject to textile quota/visa restraints for category 359.

DD 809342 is modified to accord with the above. In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels),* and internal issuance of the U.S. Customs Service which is updated weekly and is available **for inspection** at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A WOMAN'S TANK TOP

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Tide VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification of a woman's tank top. Notice of the proposed modification was published September 27, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 39.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after January 16, 1996.

FOR FURTHER INFORMATION CONTACT: Suzanne Karateew, Textile Branch, Office of Regulations and Rulings, (202) 482–7047.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On September 27, 1995, Customs published a notice in the CUSTOMS BULLETIN. Volume 29, Number 39, proposing to modify District Ruling (DD) 802308 (10/18/94), concerning the tariff classification of a woman's tank top. No comments were received from interested parties.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying DD 802308 to reflect proper classification of a worman's tank top under subheading 6109.10.0060, HTSUSA. HRL 957976, modifying DD 802308, is set forth as the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: October 30, 1995.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, October 30, 1995.

CLA–2 CO:R:C:T 957976 SK
Category: Classification
Tariff No. 6109.10.0060

JUDY A MESZAROS
PRE-CLASSIFICATION SECTION LEADER
KMART CORPORATION
INTERNATIONAL HEADQUARTERS
3100 West Big Beaver Road
Troy, MI 48084–3163

Re: Modification of DD 802308 (10/18/94): style number 1271; clasification of a ladies' tank top; 6109.10.0060, HTSUSA; *The Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories* CIE 13/88.

DEAR MS. MESZAROS:

This is in response to your letter of January 30, 1995, in which you request a modification of District Ruling 802308, issued to you on October 18, 1994, in which the Customs port at

Chicago classified a women's upper body garment under subheading 6109.10.0070, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). You submit that the garment classified in DD 802308, referenced style 1271, was properly classifiable as a women's stank top under subheading 6109.10.0060, HTSUSA. Upon your request we have reviewed DD 802308 and our analysis follows.

Facts:

Style 127I is a women's upper body garment made from finely knit 100 percent cotton jersey. The garment is sleeveless and has shoulder straps measuring two inches in diameter. The garment features a scoop neckline, a decorative/non-functional two-button front placket and a hemmed bottom.

Issue:

What is the proper classification for style 1271?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

Heading 6109, HTSUSA, provides for, "[T]-shirts, singlets, tank tops and similar garments, knitted or crocheted." The determinative issue in the instant case is whether style 1271 meets the definition of a tank top. Reference to *The Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories,* CIE 13/88, *(Guidelines)* is helpful in this instance. The *Guidelines* were developed and revised in accordance with the HTSUSA to ensure uniformity, to facilitate statistical classification, and to assist in the determination of the appropriate textile categories established for the administration of the Arrangement Regarding International Trade in Textiles.

The *Guidelines,* at page 13, offer the following with regard to the classification of tank tops:

> "* * * sleeveless [garments] with oversized armholes, with or without a significant drop below the arm. The front and back may have a round, V, U, scoop, boat, square or other shaped neck which must be below the nape of the neck. The body of the garment is supported by straps not over two inches in width reaching over the shoulder. The straps must be attached to the garment and not be easily detachable. Bottom hems may be straight or curved, side-vented, or of any other type normally found on a blouse or shirt, including blouson or draw-string waists or an elastic bottom. The following features would preclude a garment from consideration as a tank top:
>
> (1) pockets, real or simulated, other than breast pockets;
> (2) any belt treatment including simple loops;
> (3) any type of front or back neck opening (zipper buttom, or otherwise).

This office is of the opinion that style 1271 meets all of the tank top criteria noted in the *Guidelines:* the garment is sleeveless, possesses a scoop neck which falls below the nape, two-inch wide shoulder straps, a hemmed bottom and does not possess a functional front opening. Style 1271 is also suitable for use as outerwear in terms of the amount of body coverage it provides. Accordingly, classification is proper under subheading 6109.10.0060, HTSUSA.

Holding:

DD 802308 is modified.

Style 1271 is classifiable under subheading 6109.10.0060, HTSUSA, which provides for "[T]-shirts, singlets, tank tops and similar garments, knitted or crocheted: of cotton: women's or girls': other: tank tops: women's * * *," dutiable at a rate of 20.6 percent ad valorem. The applicable textile quota category is 339.

HUBBARD VOLENICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 95–172)

NEC HOME ELECTRONICS, LTD. AND NEC TECHNOLOGIES, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ZENITH ELECTRONICS CORP., DEFENDANT-INTERVENOR

Court No. 89–09–00535

(Dated October 24, 1995)

ORDER

MUSGRAVE, *Judge:* Upon consideration of plaintiffs' motion for leave to file proposed remand order and defendant's opposition to the proposed remand order as not being in conformity with *NEC Home Elecs., Ltd. v. United States,* No. 94–1390, Slip Op. (Fed. Cir. Apr. 2, 1990), it is hereby

ORDERED that this case is remanded to the Department of Commerce; and it is further

ORDERED that, upon remand, (1) the Department of Commerce will consider plaintiffs' Japanese commodity tax argument, advanced in support of the claim that NECHE's sales to NECSCs were made at arm's length and, therefore, should have been used to calculate foreign market value, based upon the information contained in the administrative record with respect to this argument, including the affidavit of Mr. Kentaro Kano; and,

(2) if the Department of Commerce rejects plaintiffs' commodity tax argument and refuses to use NEC's related-party sales in the home market for calculating foreign market value, the Department of Commerce will consider the evidence and arguments presented by plaintiffs with regard to their claim for a level-of-trade adjustment, including the affidavits of Messrs. Kazuyoshi Hatamiya and Sadao Yamazaki; and (a) if the Department of Commerce finds either of plaintiffs' methods for calculating the level-of-trade adjustment satisfactory, it will grant the adjustment; and (b) if the Department of Commerce finds both plaintiffs' methods for calculating the level-of-trade adjustment unsatisfactory, it will reject the claim for a level-of-trade adjustment, stating its reasons for the rejection; and it is further

ORDERED that the Department of Commerce will file its remand results within 90 days from the date of the entry of this order; and it is further

ORDERED that, within fifteen days after the filing of the remand results, plaintiffs will file their comments to the remand results, and, within fifteen days after the filing of plaintiffs' comments, defendant and the intervenor will file their responses to plaintiffs' comments.

Slip Op. 95–173

UNITED STATES SHOE CORP. *v.* UNITED STATES, DEFENDANT

Court No. 94–11–00668

[On cross-motions, summary judgment for the plaintiff. Judge Musgrave concurs, and also files a separate opinion.]

(Decided October 25, 1995)

Siegel, Mandell & Davidson, P.C. (Brian S. Goldstein, Steven S. Weiser, Laurence M. Friedman and *Paul A. Horowitz)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, *Jeanne E. Davidson,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(John K. Lapiana), Richard McManus,* Office of the Chief Counsel, United States Customs Service, and *Martin Cohen,* Office of the General Counsel, United States Army Corps of Engineers, of counsel, for defendant.

Baker & McKenzie (William D. Outman, II, Thomas P. Ondeck and *Kevin M. O'Brien)* for Brown-Forman Corporation, Fisher Controls International Co., Hewlett-Packard Corporation, International Business Machines Corporation, Minnesota Mining & Manufacturing Corporation and Seagate Technology Corporation, *amici curiae.*

Barnes, Richardson & Colburn (Robert E. Burke, Matthew E. McGrath, Christopher *E. Pey, Mark T. Wasden* and *Cindy H. Chan)* for Polaroid Corporation and Amoco Chemical Company, *amici curiae.*

Coudert Brothers (Steven H. Becker, Charles H. Critchlow and *Claire R. Kelly)* for Texaco Refining and Marketing Inc., American Natural Soda Ash Corp., United Export Corp., ABRO Industries, GSI Exim America, Inc., Vitol S.A., Inc., M-C International D/B/A McLane Group International L.P., Bridgestone/Firestone Inc., Dorland Management, Inc., FAI Trading Co., Star Enterprises, Inc., Vista Chemical Co., Champion International Corp., Champion Export Corp. and ISP Technologies, Inc., *amici curiae.*

Crowell & Moring (Barry E. Cohen and *Mark Tesone)* for E. I. du Pont de Nemours & Co., *amicus curiae.*

deKieffer, Dibble & Horgan (J. Kevin Horgan), for Armstrong World Industries, Inc., *amicus curiae.*

Dorsey & Whitney P.L.L.P. (John B. Rehm and *Munford Page Hall, II)* for New Holland North America, Inc., *amicus curiae.*

Grunfeld, Desiderio, Lebowitz & Silverman (Steven P. Florsheim and *Erik D. Smithweiss)* for Boise Cascade Corporation, Etonic Inc., Germain-Webber Lumber Co., Inc., International Veneer Co., Mondial International Corp. and The Heil Co., *amici curiae.*

Katten, Muchin & Zavis (Mark S. Zolno, Lynn S. Baker, Kirk T. Hartley and *Michael E. Roll)* for Baxter Healthcare Corporation, The Nutrasweet Company and Nestlé U.S.A., Inc., *amici curiae.*

LeBoeuf, Lamb, Greene & MacRae, L.L.P. (Melvin S. Schwechter, John C. Cleary and *Wendy L. Klunk)* for Aluminum Company of America, Alcoa International, S.A., Alcoa Inter-America, Inc., Alcoa Memory Products, Inc., H-C Industries, Inc. and The Stolle Corporation, *amici curiae.*

Irving A. Mandel, Jeffrey H. Pfeffer, Steven R. Sosnov and *Thomas J. Kovarcik*, of counsel, for Allied Textiles Sales Company, Sheftel International Inc., Fab-Tech Inc., Sirex, Ltd., Debois Textiles, Inc., Capital Textiles, Inc., M. Kopepel Company, Dumont Export Corporation, United Overseas Corporation, Regent Corporation and Muran Universal, Inc., *amici curiae*.

McKenna & Cuneo (Peter Buck Feller, Joseph F. Dennin, Michael K. Tomenga, Lawrence J. Bogard and *Brian O'Shea)* for Swisher International, Inc., *amicus curiae*.

Neville, Peterson & Williams (John M. Peterson, George W. Thompson, Peter J. Allen and *James A. Marino)* for Aris-Isotoner, Inc., Berwick Industries, Inc., Chevron Chemical Company, Inc., Chevron Chemical International Sales, Inc., Chevron International Oil Company, Chevron Overseas Petroleum, Inc., Chevron U.S.A., Inc., Fieldston Clothes, Inc., General Glass International Corporation, Microsoft Corporation, The Pillsbury Company, Rhone-Poulenc Inc., Uniroyal Chemical Company Inc., Xerox Corporation, Xerox Corporation, Americas Operations Division, Xerox Corporation, Southern California Manufacturing Operations Division and Xerox International Partners, *amici curiae*.

Rode & Qualey, Patrick D. Gill and *John S. Rode*, of counsel, for General Chemical Corporation, Sumitomo Corporation of America, Newell International, Siemens Energy & Automation, Inc., Siemens Power Corp., Siemens Medical Systems, Inc., Siemens Transportation Systems, Inc., Siemens Solar Industries and Unisys Corporation, *amici curiae*.

Before: DiCarlo, *Chief Judge,* Restani, *Judge,* and Musgrave, *Judge.*

Opinion

DiCarlo, *Chief Judge:* Article I, Section 9, Clause 5 of the United States Constitution (the "Export Clause") provides "[n]o Tax or Duty shall be laid on Articles exported from any State." The question presented is whether the Harbor Maintenance Tax, 26 U.S.C. §§ 4461–62 (1988 & Supp. V 1993) (Internal Revenue Code) [hereinafter "Tax"], when imposed upon merchandise exported from the United States, violates this prohibition. The court concludes that it does.

I

This case comes before the court on cross-motions for summary judgment pursuant to USCIT Rule 56. The parties agree there are no material facts in dispute. They also agree that the court has subject-matter jurisdiction to determine the constitutionality of the Tax.

Congress has given the Court of International Trade jurisdiction over matters arising out of the Tax: "For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2). This language directs that taxes imposed upon both imports and exports shall be treated as if they were customs duties, in other words, as import transactions.

Congress's purpose in centralizing jurisdiction over import transactions in the Court of International Trade was to dispel the jurisdictional confusion existing as to the Court of International Trade's predecessor, the Customs Court, and to reflect the true scope of the court's jurisdiction. *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758–59. As the legislative history of the Customs Courts Act of 1980 shows, Congress sought, by permitting a single court to hear these suits, "to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits

in the district courts only to have those suits dismissed for want of subject matter jurisdiction." H.R. Rep. No. 1235, at 47, 1980 U.S.C.C.A.N. at 3759. Accordingly, Congress granted the court exclusive jurisdiction over *any* civil action against the United States arising out of federal laws governing import transactions, because of the court's "already developed expertise in international trade and tariff matters." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 12 Fed. Cir. (T) ___, ___, 18 F.3d 1581, 1586 (1994). This authority includes the inherent responsibility to review challenges to the constitutionality of a law within that area of expertise. *See* 28 U.S.C. §§ 251, 1331, 1585 (1988) (providing this court with all powers of U.S. district courts including original jurisdiction over actions arising under Constitution); *see, e.g.*, 28 U.S.C. § 255(a)(1) (1988) (permitting designation of three-judge CIT panels to hear and determine constitutional issues). In addition to the statutory language, the legislative history of the Tax supports this court's jurisdiction. S. Rep. No. 228, 99th Cong., 1st Sess. 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6715.

Finally, this is not the first case where the court has taken jurisdiction over matters arising from the Tax; the court recently exercised jurisdiction over claims for restitution of taxes paid by passenger liners pursuant to the Tax in *Carnival Cruise Lines, Inc. v. United States*, 18 CIT ___, 866 F. Supp. 1437 (1994). In sum, in light of the Tax's plain language, its legislative history and the Court of International Trade's traditional role as the proper forum for review of actions governing import transactions, the court possesses jurisdiction to hear and determine the constitutionality of the Tax.

II

Congress established the Tax as part of the Water Resources Development Act of 1986, Pub. L. No. 96–622, 100 Stat. 4082 (codified as amended in scattered titles of U.S.C.) [hereinafter the "Act"]. While it named the charge imposed upon port users a "tax," 26 U.S.C. ch. 36, subch. A, this nomenclature is not necessarily binding on the court, *see Fairbank v. United States*, 181 U.S. 283, 304 (1901) ("we must regard things rather than names"). The provisions of the Act, including the Tax, are severable. Water Resources Development Act § 949, 33 U.S.C. § 2304 (1988).

The Tax imposes an *ad valorem* tax on "any port use" of federally-maintained navigable waterways. 26 U.S.C. §§ 4461, 4462(a)(2). The statute defines "port use" as "the loading [and] unloading of commercial cargo [on or] from [ ] a commercial vessel at a port," 26 U.S.C. § 4462(a)(1), and "port" as any channel or harbor open to public navigation that is not an inland waterway, 26 U.S.C. § 4462(a)(2)(A). The Tax is applied against imports and exports, and domestic shipments, as well as passengers. 26 U.S.C. §§ 4461(c)(1), 4462(a)(3)(A). Presently, the amount of the Tax imposed is 0.125 percent of the value of the commercial cargo involved. 26 U.S.C. § 4461(b) (Supp. V 1993). This is without regard to the size of the vessel, the manner or extent of use of port facili-

ties, or the condition of the particular port. For passengers, the statute calculates value based on the actual charge paid for the transportation. *See* 26 U.S.C. § 4462(a)(5)(B). Further, Congress does not distinguish among port users or particular ports in expending funds for harbor maintenance or operations, even though some ports or users may contribute the majority of the fees paid.

The Tax exempts certain cargo and passengers from its burden. These exemptions include fish or other aquatic animals not previously landed on shore, ferry passengers, bunker fuel, ships' stores, or equipment necessary for operation of a vessel, bonded commercial cargo entering the United States for transhipment to a foreign country, and any cargo shipped between the continental United States and Alaska, Hawaii or any U.S. possession for ultimate consumption at its destination with the exception of crude oil transported from Alaska. 26 U.S.C. § 4462. The Tax also exempts intraport movement of cargo, recreational and *de minimis* port use, port use by the U.S. government, and humanitarian and development assistance cargo. *Id.* Congress's stated purpose in enacting the Tax was to have commercial shippers fund the maintenance of U.S. harbors and ports. *See* S. Rep. No. 228, at 5, 1986 U.S.C.C.A.N. at 6709; S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644.

In enacting the Tax, Congress concurrently established the Harbor Maintenance Trust Fund, 26 U.S.C. § 9505 (1988 & Supp. V 1993) [hereinafter "Trust Fund"], to carry out the purposes of the Act. Monies collected pursuant to the Tax are transferred to the Trust Fund for disbursal upon further appropriation by Congress in accordance with the Trust Fund's provisions. 26 U.S.C. § 9505(b), (c). Since 1991, Congress has authorized appropriations from the Trust Fund to offset up to 100 percent of the eligible operation and maintenance outlays for harbors under the Act. Water Resources Development Act of 1990 § 316, 33 U.S.C. § 2238 (Supp. V 1993). Congress did not limit expenditure of Tax revenues to the U.S. Army Corps of Engineers, the largest beneficiary of the Trust Fund. Rather, the Departments of the Treasury and Commerce, and the National Oceanic and Atmospheric Administration are also potential recipients of Tax revenues. 26 U.S.C. § 9505(c); *see* Office of Management and Budget, Executive Office of the President, *FY 1996: Budget of the U.S. Government, Appendix,* 376, 802 (1995).

Despite the number of agencies eligible to receive funds, the Trust Fund has been running a yearly surplus since its inception. This surplus burgeoned with the increase in the Tax from 0.04% to 0.125%, (Br. of *Amicus* Amoco Chem. Co., Ex. A *(Second Annual Report to the Congress on the Status of the Harbor Maintenance Trust Fund For Fiscal Year 1993* 5 (1994))) [hereinafter *"Second Annual Rep."],* and is "on budget." The practice of listing trust fund revenues on budget permits them to be included in calculations of the federal budget deficit. Thus, any monies contributed by such funds to the budget decreases the Treasury's need to borrow in order to finance the federal deficit. *See* H.R. Rep. No. 251

pt. III, 99th Cong., 1st Sess. 19 (1985) ("[t]he increase in net budget receipts [provided by the Tax] will reduce the potential Federal budget deficit by a like amount by providing a new source of user-related revenues rather than relying completely on general fund appropriations"). As of 1994, the government had collected over 500 million dollars from exports alone. *(See* Br. of *Amicus* Polaroid Corp., Ex. A *(First Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund Fiscal Years 1987–1992* 4 (1993))) [hereinafter *"First Annual Rep."]; Second Annual Rep.* at 3.

Plaintiff paid the Tax on articles exported for the period April 1 through June 30, 1994. It now sues for recovery of those monies, claiming imposition of the Tax violates the Export Clause.

III

An act of Congress is presumed to be constitutional. *Fairbank,* 181 U.S. at 285. Any excess in the exercise of legislative power or conflict with the restrictions imposed by the fundamental law should be clear before the court overturns an enactment of the legislature. *Id.* Yet, as Chief Justice Marshall expounded in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), "the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Id.* at 180.

A

Defendant contends that the Tax is a valid exercise of Congress's constitutional authority to regulate foreign and interstate commerce, and does not implicate its taxing powers. According to defendant, although the Export Clause restrains those powers, the Clause cannot circumscribe Congress's unlimited capacity to regulate commerce.

The court concludes the power to regulate commerce does not eclipse the Export Clause. Although Congress can adopt the methods it deems necessary to accomplish its goals pursuant to the regulation of commerce, this authority is limited by other provisions of the Constitution. *United States v. Lopez,* 115 S. Ct. 1624, 1627 (1995) (providing that commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution") (quoting *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 196 (1824)); *North Am. Co. v. S.E.C.,* 327 U.S. 686, 704–05 (1946) (noting Congress's commerce powers are limited by express provisions in other parts of Constitution); *Rodgers v. United States,* 138 F.2d 992, 994–95 (6th Cir. 1943). Accordingly, even if the court were to find the Tax to be a charge imposed under the commerce power, such a charge is still subject to the restrictions of the Export Clause if it in fact serves as a tax or duty. For example, a charge upon exports imposed under the Commerce Clause as a user fee, or to regulate commerce, would not be immune from the restrictions of the Export Clause if the court found the charge

actually to be a tax or duty on exports. The court looks to substance over nomenclature.

The origin of the Export Clause indicates it is to have broad effect. Two amendments seeking to limit it were rejected. The first would have limited the Clause by adding "for the purpose of revenue" to the prohibition against taxes or duties on exports. II *The Records of the Federal Convention of 1787* 363 (Max Farrand ed., 1937). The second amendment would have permitted export taxes if approved by a two-thirds majority in both Houses of Congress. Note, *Constitutionality of Export Controls,* 76 Yale L.J. 200, 203 (1966). The Constitutional Convention deliberately chose to leave exports unburdened; and, in so doing, persuaded the South to join the new union. *See id.* at 204. For the Southern States, the Export Clause addressed concerns that a Congress controlled by the North would impose burdensome levies on southern exports. *International Business Machs. Corp. v. United States,* 13 Fed. Cir. (T) ____, ____, 59 F.3d 1234, 1236 (1995) [hereinafter *"IBM"].*

The Export Clause serves to keep all exportation free of any tax burden. *Fairbank,* 181 U.S. at 290. As the Court in *Fairbank* explained, "[i]f all exports must be free from national tax or duty, such freedom requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation." *Id.* at 293.

B

The court finds the Harbor Maintenance Tax as it applies to exports constitutes a tax prohibited by the Export Clause and does not fall under Congress's Commerce Clause powers. Defendant contends the Water Resources Development Act does not establish a tax upon exports in violation of the Export Clause, because enhancement of the general revenue is not its primary purpose, but is merely one aspect of a comprehensive legislative program providing for conservation and development of the nation's water resources infrastructure. According to defendant, the value of the benefit provided by the program, maintenance of safe and efficient ports and harbors, reasonably relates to the charges imposed and accrues, at least in part, to an identifiable private beneficiary. In considering the Act as a whole, defendant contends Congress simply imposed a user fee "for the purpose of making effective the congressional enactment." (Def.'s Mem. in Opp'n to *Amici* at 54) (quoting *Moon v. Freeman,* 379 F.2d 382, 391 (9th Cir. 1967)).

For defendant to succeed on this argument, the court must find that regulation is the primary purpose of the Tax, *see South Carolina ex rel. Tindal v. Block,* 717 F.2d 874, 887 (4th Cir. 1983), *cert. denied* 465 U.S. 1080 (1984), or alternatively, that Congress sought to raise money to recoup the costs of services provided to the payer pursuant to a regulatory scheme, *see Pace v. Burgess,* 92 U.S. 372, 375–76 (1876). The Tax serves neither purpose.

First, the Act neither discourages nor regulates use of a harbor; neither does it so intend. In *Moon,* the court upheld an export certificate

program for wheat farmers. 379 F.2d at 391–93. It found the program's monetary imposition for overproduction, essentially a penalty for non-compliance with the Secretary of Agriculture's production controls, did not violate the Export Clause. *Id.* The court held where regulation is the primary purpose of the statute as a whole *and* revenue also is obtained incidentally through imposition of sanctions, the Constitution will not necessarily prohibit the charge. *Id.* at 391 (quoting *Rodgers*, 138 F.2d at 994). Here, the Act does not have regulation as its primary purpose. For example, it does not seek to control the amount or manner of port use. Further, the Act does not seek to influence commercial practices, or seek to enforce compliance with a legislative goal as did the Agricultural Adjustment Act of 1938, as amended by the Food and Agriculture Act of 1964, considered in *Moon,* or the Agricultural Act of 1949, as amended, considered in *Block*. Congress instead sought funding for the extensive maintenance projects envisioned under the Act. S. Rep. No. 126 at 7, 1986 U.S.C.C.A.N. at 6644 (noting Congress intended Harbor Maintenance Tax as new tax to cover portion of Federal spending on harbor maintenance).

Second, there is little indication that Congress intended to establish a user fee. Rather, Congress found an alternative way to fund expenditures it intended to make. When Congress enacted the Tax, it intended to use the Tax to pay the costs of developing, operating, and maintaining port projects. H.R. Rep. No. 251, at 19; S. Rep. No. 228, at 5, 1986 U.S.C.C.A.N. at 6709. The Act permitted disbursement of Tax proceeds to the U.S. Army Corps of Engineers for recovery of up to 40 percent of its eligible operation and maintenance outlays. Water Resources Development Act of 1986 § 210(a)(2), 33 U.S.C. § 2238(a)(2) (1988); *see First Annual Rep.* at 1 (noting "[f]ederal expenditures for [port and harbor maintenance] were determined to be synonymous with expenditures made by the Army Corps of Engineers"). The Water Resources Development Act of 1990 increased the rate of the Tax and allowed the Corps of Engineers to recover up to 100 percent of its "eligible operations and maintenance costs." 33 U.S.C. § 2238(a)(2) (Supp. V 1993). Since its inception, the Trust Fund has accumulated significant surpluses. *See* 141 Cong. Rec. E519 (daily ed. Mar. 6, 1995) (statement of Rep. McDermott). Accordingly, we take note of the warning in *Moon,* "[c]ertainly if the record in any way indicated that substantial amounts of revenue had been generated by the sale of export certificates, we would hesitate before deeming the program an exercise of the commerce power." 379 F.2d at 392.

The court finds the primary purpose of the Tax is to raise revenue, as Congress has imposed "a duty under the pretext of fixing a fee," *Pace,* 92 U.S. at 376. For a charge to withstand constitutional challenge under the Export Clause, it must defray costs of services rendered pursuant to the regulation of commerce, and the taxes collected may not be excessive. In the *Head Money Cases (Edye v. Robertson),* 112 U.S. 580, 595–96 (1884), the Supreme Court upheld a *per capita* charge on non-U.S. citizens

arriving in the United States by ship. The Court found the statute in question imposed the fee to defray costs appropriated in advance for inspection of immigrants before landing, and for their care and provision afterward. *Id.* at 590. The Secretary of the Treasury was to "distribut[e] the fund in accordance with the purpose for which it was raised, not exceeding in any port the sum received from it." *Id.* As such, the charges imposed were incidental to the regulation of commerce and directly reimbursed the costs of services rendered to the individual.

Similarly, in *Pace,* the Supreme Court concluded that a fee for stamps used to distinguish tobacco intended for export—and thus to alleviate it from the heavy exactions placed upon tobacco sold domestically—was not a tax on exports. *See* 92 U.S. at 375–76; *see also Turpin v. Burgess,* 117 U.S. 504 (1886) (sustaining, on similar grounds, constitutionality of charge imposed to identify tobacco packages intended for export). Rather, the Court characterized the stamp as a fee "accruing in the due administration of the laws and regulations," serving simply as "compensation given for services properly rendered." *Pace,* 92 U.S. at 375. The Court found the payment for the services rendered, through identification of tobacco exported, was no different than "the fee for clearing the vessel in which [the tobacco] was transported, or for making out and certifying the manifest of the cargo." *Id.* The amount of the fee never exceeded the costs to produce the stamps and the cost of services necessary to give the exporter the benefit of the exemption from taxation; identification of the tobacco provided the exporter the direct benefit of a domestic tax exemption.

In contrast, little nexus binds the imposition of the *ad valorem* tax on cargo to the costs of port maintenance and regulation of shipping. As the exaction is tied to value and there is no mechanism to ensure that the fees collected will be used "only or primarily for the cost of" port maintenance associated with the shipping that is taxed, the Tax is not a user fee imposed under the commerce power. The fees collected, rather, yield funds for the purpose of maintaining and developing American ports and harbors for all uses, commercial and recreational. Further, the Tax funds projects yet to be commenced, or even envisioned, rather than services already rendered. Application of the Tax has produced a substantial surplus in excess of the costs incurred. The court therefore finds the Tax raises revenue, and is not a user fee imposed pursuant to the regulation of commerce.

The Supreme Court recently has used another test to distinguish between an impermissible tax and a user fee. In *Massachusetts v. United States,* 435 U.S. 444 (1978), the Court considered whether an aircraft registration fee levied on state police aircraft violated the judicially-implied intergovernmental tax immunity doctrine first set forth in *Collector v. Day,* 78 U.S. (11 Wall.) 113 (1871). In concluding that it did not, the Court relied on three criteria derived from *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.,* 405 U.S. 707 (1972). To constitute a user fee, as contrasted with a tax, the Court held: (1) the

charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of some system; and (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. *Massachusetts,* 435 U.S. at 466–70.

The Tax fails classification as a user fee under the test presented in *Massachusetts*. Although the Export Clause clearly is designed "to protect constitutionally valued activity from undue burden" that could result from certain taxing measures, *see id.* at 462, the court need not decide the issue of whether the tax is discriminatory. Even assuming, *arguendo,* that the Tax is nondiscriminatory, the court finds the Tax fails the remaining two prongs of the *Massachusetts* test.

First, the charge is not based upon some fair approximation of the cost of the benefits port users receive from harbor maintenance and development projects. Low value bulk cargo importers and exporters use port facilities to a much greater extent than high value non-bulk cargo importers and exporters. Yet, the cost to the latter is greater than that to the former. Further, most large ports paying the majority of the costs receive no more than 30% back in maintenance expenditures. *(See, e.g.,* Br. of *Amicus* Amoco Chem. Co., Ex. G (Army Corps of Engineers, *Estimated Receipts of Harbor Maintenance Fee from Cargo Transiting Major Ports* (1992))) (draft document) (noting of $78,711,000 estimated collected 1992 taxes on exports and imports from Port of Los Angeles, only $162,000 returned in port operation and maintenance expenditures). Additionally, although only certain commercial users must pay the tax, they are not the sole users of the ports nor the only beneficiaries of the maintenance and development projects. Based on the foregoing, the court does not find the charge imposed under the Tax is based on a fair approximation of the costs of benefits received by port users.

Second, the charge is excessive in relation to the cost to the government. The Tax is used to fund projects yet to be commenced, or even envisioned, rather than to repay the government for services rendered. The Tax has produced a substantial surplus, that is rapidly expanding, in excess of costs incurred. *Second Annual Rep.* at 5.

In sum, the Tax neither seeks to regulate Commerce nor repay the costs of services rendered; moreover, the Tax fails the alternative test provided by *Massachusetts*. Accordingly, the Tax is subject to the prohibitions of the Export Clause.

C

Defendant questions whether the Harbor Maintenance Tax is a tax levied upon "exported articles" within the meaning of the Export Clause. According to defendant, a tax or fee only violates the Export Clause if it is levied on goods by reason of their exportation, *e.g.,* if such goods have entered the export stream. Defendant contends the broad prohibition of the earlier cases against a tax upon goods having entered the export stream was curtailed by *Michelin Tire Corp. v. Wages,* 423

U.S. 276 (1976), and further constrained in *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978).

Further, according to defendant, imposition of the Tax upon loading of freight is merely intended to ensure that those who actually use the ports would pay. As such, the time when the Tax attaches has no other significance for purposes of assessment of the fee upon exports. The motivation behind imposing an *ad valorem* charge, defendant insists, was to minimize possible competitive disadvantages among cargo types and U.S. ports that would have arisen from a user charge.

In any case, defendant argues the *Michelin* and *Washington Stevedoring* tests now examine the nature of the tax at issue, rather than the status of the article. Those cases explored whether the taxes were upon "exports as such" and whether they offended the policies protected by the framers of the Constitution. Those policies, defendant argues, include promoting uniformity among the former colonies and preventing the North from crippling the export-dependent Southern States pursuant to the Import-Export Clause. U.S. Const. art. I, § 10, cl. 2 ("No States shall * * * lay any Imposts or Duties on Imports or Exports * * *."). Specifically, defendant contends *Michelin* established that a nondiscriminatory *ad valorem* property tax did not violate the Import-Export Clause simply because it applied to recently imported goods—there, tires maintained at a wholesale distribution warehouse. 423 U.S. at 286. Similarly, defendant contends *Washington Stevedoring* held that a nondiscriminatory local tax that compensates the state for services rendered also failed to implicate the concerns of the Import-Export Clause. 435 U.S. at 755.

Integral to these tests, defendant contends, is the court's examination of whether the charge discriminates in imposing its burden. According to defendant, a nondiscriminatory charge for a service that facilitates export activity does not violate the Export Clause. Defendant maintains the Tax is such a charge. The court disagrees.

In examining whether the Tax burdens "exported articles," the court limits its inquiry to the Export Clause, for there is a distinct difference in language between the Import-Export Clause and the Export Clause. *See IBM*, 13 Fed. Cir. (T) at ____, 59 F.3d at 1238–39. The decisions in *Michelin* and *Washington Stevedoring* attached significance to the distinction between "Imposts and Duties," and the Export Clause's broader prohibition. *See Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759–60. As the Supreme Court in *Michelin* noted, the Import-Export Clause only bans "Imposts or Duties" and is not "a broad prohibition of every 'tax.'" 423 U.S. at 290. According to the Federal Circuit, a difference in policy intended by the framers of the Constitution underlies the difference in language:

> While the Import-Export Clause was intended to prohibit States from imposing a 'transit fee' on goods moving in foreign commerce, the Export Clause served the broader purpose of 'forbid[ding] federal taxation of exports.' The Supreme Court's current narrower view of the prohibition in the Import-Export Clause thus does not

dictate that the Export Clause be given a similarly narrow construction.

IBM, 13 Fed. Cir. (T) at ____, 59 F.3d at 1239 (citations omitted). Defendant's citations of *Michelin* and *Washington Stevedoring* are, thus, inapplicable.

Moreover, even if this court were to assume *Michelin* and *Washington Stevedoring* apply to the Export Clause, the cases remain distinguishable. *Michelin* concerned imported tires that had already lost their identity as a unit and as an import after being unloaded and stored within a warehouse. *See* 423 U.S. at 280. At the warehouse, workers unloaded the containers in which the tires were shipped, sorted the tires by size and style, and stacked them on wooden pallets, without segregation by place of manufacture. *Id.* The tires required no further processing to ready them for sale and delivery to franchised dealers. *Id.* In this sense, the Court found the warehouse operated "no differently than * * * a distribution warehouse utilized by a wholesaler dealing solely in domestic goods." *Id.* at 302. Accordingly, the holding in *Michelin* turned on the fact that the goods were no longer in import transit. *Id.* at 286.

As distinguished from the unloaded and unpacked imports in *Michelin*, the cargo taxed in this case has entered the stream of exports. The cargo, as it is loaded on board the vessel, is in transit, and the Tax falls upon the merchandise itself. As such, it is an article protected by the Export Clause. *Michelin* is inapplicable.

In *Washington Stevedoring*, the Supreme Court upheld a business and occupation tax imposed by the State of Washington upon the value of certain *services* rendered—the loading and unloading of cargo. *Id.* at 737, 758. The Court distinguished the stevedoring services from maritime insurance policies covering such goods. *Id.* at 756 n. 21. The Court found placing a tax upon the insurance policies was more suspect, and likely unconstitutional as a violation of the Import-Export Clause, because "the value of goods [bore] a much closer relation to the value of insurance policies on [those goods] than to the value of loading and unloading ships." *Id.* As the amount of the Tax *ad valorem* is tied directly to the value of the goods, *Washington Stevedoring* is equally inapplicable.

Two distinct tests have evolved from case law for determining whether the Export Clause will immunize an article from taxation. First, the court must examine the immediacy of exportation. Second, the court considers the proximity of the tax imposed to the value of the articles exported. Here, neither test supports the constitutionality of the Tax.

In delineating a zone where an article in the stream of commerce melds into the export stream, the court looks to see whether the article is in the actual process of exportation, and whether it "has begun its voyage or its preparation for the voyage." *Cornell v. Coyne*, 192 U.S. 418, 428 (1904). For instance, where exported articles were delivered to the carrier and title passed, the Supreme Court found those articles had

entered the process of exportation. *A.G. Spalding & Bros. v. Edwards,* 262 U.S. 66, 68–70 (1923). Thus, taxing such articles would have been unconstitutional. Although other actions may have been necessary before the goods would have been in transit, "so long as [these actions] were only the regular steps" taken to export such goods, the effect of the sale was to start the goods upon their voyage abroad. *See id.* at 69–70.

Constitutional freedom from the taxation of exports involves more than mere exemption from taxes laid directly upon the articles exported. In *Fairbank,* the Court held that a stamp tax imposed on a foreign bill of lading was equivalent to a tax upon the articles listed, and therefore contrary to the Export Clause. 181 U.S. at 312. The Court noted exports almost always require bills of lading. *See id.* at 294 (citing *Almy v. California,* 65 U.S. (24 How.) 169, 174 (1861) (noting necessities of foreign commerce always require association with bill of lading or similar written instrument). By placing a tax on the bill of lading, the Court reasoned, Congress had violated the letter and spirit of the Export Clause. *See id.* at 290–291, 300, 312.

Similarly, in *Thames & Mersey Marine Insurance Co. v. United States,* 237 U.S. 19 (1915), the Supreme Court found a tax upon policies of marine insurance on exports prohibited by the Constitution. In reaching its determination, the Court inquired whether the tax imposed was so directly and closely related to the process of exportation that the tax was in substance a tax upon the exports themselves. *Id.* at 25. The Court found its answer within the dynamics of trade and commerce: where commerce requires an item for exportation—such as a written instrument necessarily and always associated with the export of articles of commerce—taxation of that item serves as taxation of the exported article. *Id.* at 26–27. This prohibition of the Export Clause also has been applied to taxes upon charter parties, contracts for the carriage of full cargo lots, *United States v. Hvoslef,* 237 U.S. 1, 16–17 (1915) and, more recently, to excise taxes on premiums paid to foreign insurers, *IBM,* 13 Fed. Cir. (T) ____, 59 F.3d 1234.

Here, Congress imposed the Tax directly upon exports well along the stream of exportation. The Tax is assessed at the time of loading the cargo. 26 U.S.C. § 4461(c)(2). As a tax imposed upon delivery of cargo to a carrier violates the Export Clause, *see A.G. Spalding,* 262 U.S. at 68–70, a tax imposed on the further step of loading such cargo onto the vessel also falls within the prohibition of the Clause.

The Tax is assessed *ad valorem* directly upon the value of the cargo itself, not upon any services rendered for the cargo, or upon any instruments of commerce that accompany the goods. Further, an *ad valorem* tax is levied in direct proportion to an article's value. Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported.

Accordingly, the court concludes the Tax is prohibited by the Export Clause and it need not address *amici*'s (claimants in other cases) conten-

tions pertaining to whether the Tax also violates the Due Process Clause or the Port Preference Clause of the Constitution.

IV

As indicated, the parties agree that this court has subject matter jurisdiction, *see supra* p. 3, but disagree as to the specific basis upon which exporters may make claims. Two subsections of the court's jurisdictional statute may provide the parties a route for judicial review. *See* 28 U.S.C. § 1581(a), (i) (1988 & Supp. V 1993). Subsection 1581(a) provides for review of a denial by the Customs Service of a protest of certain duties, charges, exactions, or drawbacks. 28 U.S.C. § 1581(a); 19 U.S.C. § 1515 (1988 & Supp. V 1993). A party must protest a Customs decision within 90 days of the date of the decision to be protested. 19 U.S.C. § 1514(c)(3)(B) (Supp. V 1993). On the other hand, subsection 1581(i) gives the court broad residual authority over civil actions arising out of federal statutes governing import transactions. *Conoco,* 12 Fed. Cir. (T) at ____, 18 F.3d at 1586. Subsection 2636(i) of the same title requires a party to commence an action under subsection 1581(i) "within two years after the cause of action first accrues." 28 U.S.C. § 2636(i) (Supp. V 1993). The court's decision as to the appropriate jurisdictional basis relates to the amount of plaintiff's recovery.

A

Defendant argues jurisdiction is only proper under subsection 1581(a). According to defendant, the court may review challenges to the constitutionality of the Tax only where an exporter properly protests its payment, and seeks review of the denial of that protest. Although defendant concedes that "neither jurisdictional provision may fit exactly," (Tr. of Oral Argument at 24 (June 27, 1995)) [hereinafter "Tr."], defendant contends permitting this case to rest upon any other jurisdictional ground would greatly expand the government's liability and would disregard the only congressionally-mandated avenue to challenge the Tax.

According to defendant, Congress intended this Court to entertain a tax challenge only after an exporter had protested its payment of the tax. Defendant garners support for this interpretation from the statutory language directing the court to treat the tax as a customs duty for the purpose of jurisdiction. If the court properly is to treat the tax as a customs duty, defendant contends, the protest procedures under subsection 1581(a) must govern.

Further, defendant argues, there is a Customs decision for the parties to protest—Customs' decision to accept payment. (Tr. at 25.) Defendant contends administration of the Tax is not merely ministerial, because subsection 4462(i), title 26, United States Code authorizes Customs, through the Department of the Treasury, with administering the assessment of the Tax. Defendant claims Congress has delegated substantial authority to the Secretary of the Treasury (1) to determine the method of payment and collection of the Tax; (2) to exempt certain transactions from the Tax where collection would be impracticable; and (3) to provide

for mitigation of penalties and the settlement of claims. Defendant claims this grant of power gives the Secretary of the Treasury "near plenary authority to 'carry out the purposes' of the Act." (Def.'s Mem. in Opp'n to *Amici* at 34.) Accordingly, defendant contends, Customs' power to administer the Tax transcends a ministerial role.

Defendant cites a number of authorities in support of its position. In *Norfolk & Western Railway Co. v. United States,* 18 CIT ____, 843 F. Supp. 728 (1994), defendant asserts the court found the assessment of a user fee similar to the Tax constituted a protestable decision, and the period for filing the protest began when Customs decided the plaintiff would have had to pay the fee. In *General Motors Corp. v. United States,* 10 CIT 569, 643 F. Supp. 1139 (1986), defendant contends the court held administrative procedures, where available, had to be exhausted even before Customs issued its decision. According to the defendant, although the court found the obligation to pay the charges was derived from statute, payment of the duties was pursuant to section 1514, and therefore protestable. The fact that Customs took no affirmative action to collect the duties but only accepted or rejected certain offers, defendant argues, did not alleviate the need for protest.

These arguments are unpersuasive. Section 1581(a) permits review of protest denials by Customs for only certain final decisions enumerated in 19 U.S.C. § 1514(a). *See* 28 U.S.C. § 1581(a); 19 U.S.C. § 1515. For a party to be able to protest and obtain jurisdiction pursuant to section 1581(a), Customs first must have made a decision. *See* 19 U.S.C. § 1514(a), (c) (1988 & Supp. V 1993) (noting Customs decisions are final unless protested and that such protests must "set forth distinctly and specifically" each decision protested).

Acceptance of payment of duties owed does not constitute a protestable decision. *See Dart Export Corp. v. United States,* 43 CCPA 64, 74, C.A.D. 610 (holding Customs' acceptance of estimated duties tendered did not constitute decision), *cert. denied,* 352 U.S. 824 (1956); *Best Foods, Inc. v. United States,* 37 Cust. Ct. 1, 9–10, 147 F. Supp. 749, 756–57 (1956) (holding payment of customs duties at time of entry not decision for purpose of computing time to file protest). Customs plays little role in accepting the payments; rather, they arrive at a "postal rental box serviced by a commercial bank that processes [Harbor Maintenance Fund] payments and deposits them to the United States Treasury." United States General Accounting Office, *U.S. Customs Service: Limitations in Collecting Harbor Maintenance Fees,* GAO/GGD–92–25, at 5 (Dec. 1991). As recognized by this court in *Carnival,* it would be impossible to protest the Tax as "there was no decision of Customs which [plaintiffs] could protest." 18 CIT at ____, 866 F. Supp. at 1441.

Neither the Harbor Maintenance Tax statute, nor its regulations, require a decision from Customs. As previously noted, the statute imposes a Tax on commercial cargo at loading for exports and unloading for imports. 26 U.S.C. § 4461(c)(2). Liability is an *ad valorem* percentage of the cargo value. 26 U.S.C. § 4461(b) (Supp. V 1993). Value is

determined by standard commercial documentation. 26 U.S.C. § 4462(a)(5)(A). Thus Congress, and not Customs, has set the time of imposition and the amount of the Tax. The regulations require exporters to pay port "use fees" on a quarterly basis and mail their payment with a quarterly summary report or cover letter identifying the exporter to Customs' post office box in Chicago. 19 C.F.R. § 24.24(e) (1995). Exporters may request refunds by mailing an amended quarterly summary report with a copy of the quarterly summary report for the quarter(s) in which they request a refund to the Chicago post office box, *id.*, or alternatively by filing with Customs Headquarters through general provisions for claims not otherwise provided for by the regulations, 19 C.F.R. § 24.73 (1995). None of these procedures requires Customs to judge the constitutionality of the Tax, and cannot be considered decisions with respect to payment. These actions are merely ministerial in nature. Although there may be circumstances where Customs might exercise discretion in administering and enforcing the Tax, this discretion does not extend to a determination on the constitutionality of the Tax.

In this case, there are no issues of classification or similar issues which would be part of a protestable decision. In *Mitsubishi Electronics America, Inc. v. United States,* 12 Fed. Cir. (T) ____, ____, 44 F.3d 973, 976 (1994), the Federal Circuit held Customs does not make protestable decisions concerning antidumping duties under 19 U.S.C. § 1514(a). The Court of Appeals emphasized that Customs only performed a ministerial function in collecting such duties under the direction of the Department of Commerce, and Customs did not conduct an investigation, determine rates and margins, or issue antidumping orders. 12 Fed. Cir. (T) at ____, 44 F.3d at 977. Plaintiff and *amici* do not argue that they have overpaid the amount of the Tax; rather, their challenge goes to the heart of the constitutionality of the statute itself, a matter outside of Customs' authority. *See generally McCarthy v. Madigan,* 503 U.S. 140, 147–48 (1992) (noting agency may be unable to consider whether relief should be granted, because of lack of institutional competence to resolve issues presented). Similarly, in *United States Cane Sugar Refiners' Ass'n v. Block,* 3 CIT 196, 201, 544 F. Supp. 883, 887, *aff'd,* 69 CCPA 172, 683 F.2d 399 (1982), in which protest was not required, Customs could not change the scope of the Presidential Proclamation as to over-quota sugar. Much like *Mitsubishi* and *Cane Sugar Refiners',* there is no decision by Customs as to whether it will assess the Tax.

Customs does not determine the application, policies, or rates of the Tax, but merely serves to implement its provisions. As distinguished from *National Corn Growers Ass'n v. Baker,* 6 Fed. Cir. (T) 70, 840 F.2d 1547 (1988), where the policies and rates in question were those of Customs, and "peculiarly within the ambit of the Customs Service to correct," 6 Fed. Cir. (T) at 82, 840 F.2d at 1556, Customs is powerless to correct the constitutional infirmities raised by plaintiff. *See Califano v. Sanders,* 430 U.S. 99, 109 (1977) (finding administrative hearing proce-

dures unsuited to resolving constitutional issues). In short, Customs must simply follow the path enacted by Congress.

Moreover, neither of defendant's proffered cases, *Norfolk* nor *General Motors*, supports its position. The protestable decision in *Norfolk*—an assessment of a user fee—is distinguishable from the present case. In *Norfolk*, the protestable decision was Customs' particular application of a statute. 18 CIT at ____, 843 F. Supp. at 733. Customs' decision was limited to whether a vessel constituted a ferry or a barge, not whether the application of the user fee was constitutional.

General Motors is equally inapposite. The issue concerned whether car radio components imported into the United States as original motor-vehicle equipment were diverted for other uses, and therefore subject to penalty. 10 CIT at 570, 643 F. Supp. at 1139–40. Defendant argues the court found "*payment* [of duties] equated to the protestable event," even though the duty to pay was derived from statute, and not a Customs decision. (Def.'s Br. in Opp'n to *Amici* at 32.) This argument is misplaced. Plaintiff only paid the diversion duties "[o]nce Customs indicated to plaintiff that it *considered* the merchandise diverted." 10 CIT at 575, 643 F. Supp. at 1143 (emphasis added). Customs made a decision in finding General Motors had diverted the radios. Again, Customs did not consider the constitutionality of the statutory scheme as a whole.

Defendant's own arguments support Customs' inability to make a decision as to the constitutionality of the Tax. Defendant initially argues, "[t]he decision requiring the payment is the law itself, the compulsion to pay is provided by the statute itself. The decision is the decision to accept payment from the exporter." (Tr. at 26.) Defendant subsequently qualifies this statement, noting, "[i]t isn't a decision by Customs to accept and retain the money, it has no authority to return it unless the proper procedures have been followed, which are filing of a protest and a denial of a protest." *Id.* at 59. Such reasoning is circular. For plaintiffs to file a valid protest, Customs must have made a protestable decision. As a decision, according to the defendant, can only be made after the protest is filed, no protestable decision exists.

Finally, certain *amici* contend the denial of a refund request pursuant to 19 C.F.R. § 24.24(e)(5) is a protestable decision, and that subsection 1581(a) would provide the appropriate basis for jurisdiction. Although Customs has discretion to decide whether it is able to refund payments of the Tax, such discretion is limited and does not extend to determinations of constitutionality. As Customs does not have the power to decide the constitutionality of the Tax, the court finds protestable decisions pursuant to the refund provision of subsection 24.24(e)(5) are limited to decisions pertaining to the administration of the Tax, not its constitutionality.

B

Subsection 1581(i) embraces the issues contested as to the Harbor Maintenance Tax. It provides, in pertinent part,

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> * * *;
>
> (4) administration and enforcement with respect to the matters referred to in paragraph (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i). Congress directed the Tax be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within subsection 1581(i)(1).

Congress similarly intended the administration and enforcement of the Tax to be treated as the administration and enforcement of a customs duty. 26 U.S.C. § 4462(f)(1). Thus, jurisdiction lies under subsection 1581(i)(4) as it relates to subsection 1581(i)(1).

In sum, jurisdiction is provided by 28 U.S.C. § 1581(i).

V

The court finds the Harbor Maintenance Tax, as it applies to exports, unconstitutional. Plaintiff's motion for summary judgment is granted; defendant's cross-motion for summary judgment is denied. Parties are to submit a proposed judgment in conformity with the opinion within 20 days.

MUSGRAVE, *Judge* concurring:

I concur in the opinion that the Harbor Maintenance Revenue Act (the "Act") is unconstitutional as it applies to exports and that the plaintiff U.S. Shoe is entitled to the remedy it requests, namely a refund of export taxes going back two years from the time it filed its complaint. Nevertheless, I offer some additional comments addressing the jurisdictional issue and the prayers of certain *amici* for a full refund of all taxes illegally collected from them since the implementation of the Act.[1] In my view, the manifestly inadequate administrative protest procedure under 28 U.S.C. § 1581(a) is a further reason that 28 U.S.C. § 1581(i)

[1] *E.g.*, "*Amici* respectfully join in plaintiff's request that this Court find the HMT unconstitutional, strike it down, and direct pursuant to the power granted it under 28 U.S.C. § 1585 that *all HMT payments unlawfully collected be refunded*, together with such other and further relief as may be appropriate." (*Amici* Texaco *et al.*'s Mem. Supp. Summ. J. at 2) (emphasis added).

jurisdiction arises; moreover, complainants are entitled to a restitution of all taxes heretofore exacted under the Act in violation of the Export Clause of the United States Constitution.[2] This latter position is compelled by the Fifth Amendment Due Process Clause enjoining the deprivation of "life, liberty, or property, without due process of law."

I

As an initial matter, recent opinions of the Court of Appeals for the Federal Circuit and this Court have ruled unambiguously that a *decision* by the Customs Service ("Customs") is a condition precedent for section 1581(a) jurisdiction to arise. *Mitsubishi Electronics of America, Inc. v. U.S.*, 44 F.3d 973 (Fed. Cir. 1994); *Carnival Cruise Lines v. U.S.*, 18 CIT ____, 866 F. Supp. 1437 (1994). As the Court's opinion makes abundantly clear, there is no *decision* involved in Customs' collection of these unconstitutional taxes because Customs lacks discretion in the performance of its delegated ministerial duties. In addition to this reason, however, there is a further justification for the Court to invoke its section 1581(i) jurisdiction in this case: requiring plaintiffs to pursue a remedy under the protest procedures mandated by section 1581(a) would oblige them to follow a manifestly inadequate and utterly futile procedure.

Certain *amici* argue that a party could presumably request a refund as set forth in 19 C.F.R. §§ 24.24(e)(5) or 24.73, obtain a denial of refund from Customs, and then protest that decision of Customs to deny the refund by way of the administrative protest process prescribed by 19 U.S.C. §§ 1514 and 1515. According to these *amici*, the Court could dismiss as not ripe for adjudication those actions which were filed prior to Customs denying a refund request, but instead should waive exhaustion of administrative remedial procedures and assert jurisdiction under section 1581(i), as such procedures are inadequate for the type of relief sought. (Br. of *Amici Curiae* Aris-Isotoner, *et al.*, at 14–22.) Plaintiff and nearly all *amici* argue that the available administrative protest remedy set forth in 19 U.S.C. §§ 1514 and 1515 is futile and manifestly inadequate under the circumstances. The ultimate issue presented by such arguments is whether administrative remedies set forth by statute and regulations are appropriate when a party seeks a refund of payments mandated by an act of Congress by challenging such act as unconstitutional.

The administrative remedial procedure as it applies to refund requests is clearly not meaningful or adequate under the given circumstances. *See generally McCarthy v. Madigan*, 503 U.S. 140, 144–149 (1992) (explaining circumstances in which administrative remedies need not be exhausted); and *Conoco v. Foreign Trade Zones Board*, 18 F.3d 1581 (Fed. Cir. 1994) (holding section 1581(a) jurisdiction inappropriate where it is futile or manifestly inadequate). Most importantly, as the Court's opinion makes clear, Customs does not have authority to

[2] The other jurists on this panel are not in accord with the comments addressing the remedy issue.

refund Tax payments or otherwise grant effective relief for constitutional claims. It is well settled that an administrative agency lacks the authority to declare an act of Congress unconstitutional. *See Califano v. Sanders,* 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."). Hence, under the circumstances of this case Customs is compelled to deny any administrative refund claim, making a request for refund a futile act.

Moreover, Customs has predetermined the issue before it. As plaintiff points out, Customs' denial of protests challenging the constitutionality of the Harbor Maintenance Tax (26 U.S.C. §§ 4461 and 4462, hereinafter the "Tax") is a foregone conclusion. (Pl.'s em. Supp. Summ. J. at 15–16.) Customs routinely denies all of the protests it receives in connection with Tax payments. The denial is a form letter simply asserting in one sentence that the levy is not an unconstitutional tax but a statutorily mandated user fee.[3] Such routine denial demonstrates that filing refund requests with Customs on grounds of unconstitutionality is clearly a futile act.

Lastly, requiring a party to file for refunds may unduly prejudice that party. "[P]rejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action." *McCarthy,* 503 U.S. at 147. The administrative refund processes set forth under 19 C.F.R. §§ 24.24(e)(5) and 24.73 do not provide a time frame for the resolution of a claim for refund. This Court has recently deemed it appropriate to waive exhaustion of administrative remedies because they were not clearly delineated and because they set up indefinite timetables. *B-West Imports v. United States,* 19 CIT ____, Slip Op. 95–28 (Feb. 24, 1995). The administrative refund procedures are similarly indefinite and are therefore inadequate under the circumstances of the present case.

Before this Court may exercise jurisdiction over this matter by way of section 1581(i), there must be terms within the language of that section which cover the issues plaintiff brings before the Court. *Conoco,* 18 F.3d at 1588–89. Defendant argues that section 1581(i) by its own terms fails to provide a jurisdictional basis for a constitutional challenge to the Tax because plaintiff's claims are based upon payments associated with exports, while the express terms of subsections 1581(i)(1) and (2) apply only to imports. (Def.'s Mem. Supp. Summ. J. at 24.)

The terms of section 1581(i) make clear that the Court has jurisdiction over any civil action that arises out of any United States *law* providing for the matters set forth in the statute. Defendant's reading of section 1581(i) would eliminate that all-encompassing term and in effect grant the Court jurisdiction only over the specific matters set forth in subsections 1581(i)(1)–(4), but not the *laws* dealing with those matters. Such an interpretation would mean that this Court would have

[3] Declaration of Charles Davies, Director—User Fee Task Force, Headquarters Office of Inspection and Control at 6, and attachments.

jurisdiction over the Tax as it applies to imports, the district courts would have jurisdiction over the Tax as it applies to exports, and it is uncertain as to which court would have jurisdiction over the Tax as it applies to, *e.g.*, passenger services.

As the opinion of the Court points out, Congress did not intend for the district courts to exercise jurisdiction over the Tax. The statutory language of 26 U.S.C. § 4462(f)(2) and its accompanying legislative history indicate Congress' clearly stated intention that this Court have jurisdiction over the Tax. Furthermore, "[S]ection 1581(i) was intended to give the Court of International Trade broad residual authority over civil actions arising out of federal *statutes* governing import transactions and to eliminate the confusion over whether jurisdiction lay in the Court of International Trade or the district courts." *Conoco,* 18 F.3d at 1588 (emphasis added). Thus it was the intent of Congress for this Court to exercise jurisdiction over the entire Tax, not just those portions of the Tax that are covered under the specific subsections 1581(i)(1)–(4).

The terms of section 1581(i) embrace the Tax. This Court has found that the Tax is a law which provides for revenues from imports and exports, and for the administration and enforcement with respect to those revenues including the protest process. Therefore, subsections 1581(i)(1) and (4) provide this Court with jurisdiction over the Tax.

In sum, Customs has not made a decision with respect to the Tax upon which a valid or meaningful protest may be predicated. Defendant's arguments simply ignore that necessary prerequisite to the protest process set forth under 19 U.S.C. §§ 1514 and 1515. Moreover, under the circumstances of this case, it is futile and manifestly inadequate to await a decision by Customs with respect to an administrative refund request. As required, the terms of section 1581(i) cover the issues that plaintiff brings before the Court. The Court's jurisdiction is therefore properly asserted over this matter by way of section 1581(i). The Court is authorized by statute to exercise discretion in requiring exhaustion of administrative remedies. 28 U.S.C. § 2637(d). Having found jurisdiction under section 1581(i), pursuant to this Court's discretionary powers under 28 U.S.C. § 2637(d), and for the reasons previously discussed, it is inappropriate to require exhaustion of any administrative remedy when, as in this case, a party requests a refund by challenging the constitutionality of an act under which payment was made.

II

It is the duty of this Court to exercise judicial review over Congressional acts within its jurisdiction, and "[s]hould Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution * * * it would become the painful duty of this tribunal * * * to say, that such an act was not the law of the land." *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 423 (1819). As the opinion of the Court details, there is no question that the Act violates the Export Clause. Insofar as the Act therefore is not the law of the land, it is void *ab initio:* "an invalid exercise of the power of Congress * * * [is] as inoperative as if it had never

been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity * * *." *Chicago, I. & L. R. Co. v. Hackett,* 228 U.S. 559, 566 (1913). When the invalid act is the federal government's unconstitutional exaction of taxes, taxpayers' rights under the Due Process Clause of the Fifth Amendment are implicated. "Thus, if a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy." *Reynoldsville Casket Co. v. Hyde,* 115 S. Ct. 1745, 1752 (1995) (Scalia, J., concurring).

A tax refund is the only appropriate remedy for the government's illegal collection of revenue under the Act. Because the tax violates the Export Clause, it was "beyond the [government's] power to impose, * * * [and the government has] no choice but to undo the unlawful deprivation by refunding the tax previously paid under duress, because allowing the [government] to collect these taxes by coercive means and not incur any obligation to pay them back * * * would be in contravention of the [Due Process Clause]." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation,* 496 U.S. 18, 39 (1990). Yet an attempt to collect all moneys illegally exacted since the tax's incipience in 1987 ostensibly conflicts with the two-year statute of limitations applicable generally to claims brought under 28 U.S.C. § 1581(i). Due to the peculiar circumstances of this case, however, enforcing the statute of limitations would impermissibly infringe constitutional rights guaranteed under the Fifth Amendment Due Process Clause.

The United States Supreme Court has held that "[a] constitutional claim can become time-barred just as any other claim can * * *. Nothing in the Constitution requires otherwise." *Block v. North Dakota,* 461 U.S. 273, 292 (1983). While valid claims based upon unconstitutional acts by the federal government may at some time become stale or deemed waived, an attempt, as here, at interposing a very short statute of limitations runs afoul of due process and flaunts the sovereign's role as, among other things, protector of rights of its citizens, from whom *this* government, almost uniquely when it was created, acquired all of its powers. And here, the legislative history reflects that the drafters of the Act were abundantly aware of the constitutional infirmity of the Act; this being true, enforcing the foreshortened statute of limitations is to reward the perpetration of an overtly unconstitutional action.

The Bill of Rights incorporates those indefeasible rights which the citizens decline to surrender to the sovereign, and it is this very feature of our constitutional democracy—that the government is empowered only to the extent that citizens surrender their rights—which distinguishes it from other political systems in which people derive their rights only from the state. Although the federal government enjoys broad immunity, this immunity does not extend to unconstitutional behavior, and a statute of limitations that operates in violation of the Due Process

Clause constitutes an invalid exercise of the power of Congress which does not immunize the government from suit.[4]

> [T]he exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.[5]

Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948). "[T]o hold otherwise would be to create the possibility that Congress could act unconstitutionally and then attempt to shield its action from review by virtue of sovereign immunity." *Bartlett v. Bowen*, 816 F.2d 695, 708 (D.C. Cir. 1987). Thus, it is to no avail that the interlocutor points to the jurisdictional nature of the statute of limitations presently under consideration. Moreover, "The courts * * * have recognized a principle that the constitutional guarantee of an independent judiciary limits the legislature in the exercise of its power to regulate court jurisdiction." *Bartlett*, 816 F.2d at 705. The judicial branch must not countenance the disenfranchisement of democratic constitutional rights in deference to the royal cloak of sovereign immunity. To do so would be to abrogate the judiciary's proper role as protector and final arbiter of constitutional rights, a role implicit in the separation of powers established by our constitutional scheme and made decisively explicit in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

The Supreme Court has recognized that procedural requirements in tax refund cases must satisfy all the provisions of the Constitution. Discussing procedural obstacles which might bar a refund of state taxes collected in violation of the Constitution, the Court declared, *"Depending upon whether or not this independent rule satisfied other provisions of the Constitution,* it could independently bar the taxpayers' refund claim." *Hyde*, 115 S.Ct. at 1750 (emphasis added). In this vein the Court has indicated that states may enforce "relatively short statutes of limitation applicable to such actions." *McKesson*, 496 U.S. at 45 (citing Florida's three-year statute of limitations for tax refund suits). Although states may promulgate statutes of limitations in connection with tax refund statutes, they are bound to provide substantive relief for revenue exacted in violation of the Constitution. A state's post-deprivation tax refund regime must afford "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful

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[4] *See* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1427 (1987) ("[W]henever a government entity transgresses the limits of its delegation [of powers] by acting *ultra vires*, it ceases to act in the name of the sovereign, and surrenders any derivative "sovereign" immunity it might otherwise possess.").

[5] *See also International Tel. & Tel. Corp. v. Alexander*, 396 F.Supp. 1150, 1163 n.31 (D. Del. 1975) (discussing federal tax protest and remedy statutes and declaring, "As previously noted, both statutes are jurisdictional and are within the power of Congress to enact pursuant either to Art. III, § 1 of the Constitution or the sovereign immunity of the federal government * * *. These respective sources of power, however, cannot be utilized by Congress to shield from judicial review governmental action violative of constitutional guarantees.").

deprivation of property." *McKesson,* 496 U.S. at 40 (quoting *Atchison, T. & S. F. R. Co. v. O' Connor,* 223 U.S. 280, 285 (1912)). Moreover, when a state places

> a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide *meaningful backward-looking relief to rectify any unconstitutional deprivation.*

Id. at 31 (emphasis added).

In tax refund cases the Fifth Amendment Due Process Clause does not endow the federal government with the flexibility the states enjoy when fashioning schemes to redress unconstitutional exactions. The relevant *state* obligations under the Fourteenth Amendment Due Process Clause owe their flexible nature to principles of federalism and comity:

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration* * *. [T]his Court [has repeatedly] shown an aversion to federal interference with state tax administration* * *. The reluctance to interfere in state tax collection continued in *McKesson,* in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation.

National Private Truck Council v. Oklahoma Tax Comm'n, 115 S.Ct. 2351, 2354 (1995) (citation omitted). In the instant case, there exists no question of "comity" between the federal government and a state, and under *McKesson* and its progeny, a two-year statute of limitations in tax refund cases may well be unconstitutional at the state level. Although there is no precedent directly on point, it is evident that in this case, the more stringent due process obligations incumbent on the federal government entail that enforcing the two-year statute of limitations would infringe Fifth Amendment rights by, *inter alia,* failing "to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."

There is no need to speculate on a constitutionally permissible term for a statute of limitations in this type of case. Having found the statute of limitations inapplicable, it is my opinion that the imperatives of due process require a full refund back to the date of the Act's implementation, *i.e.,* 1987 (the bulk of unconstitutional exactions appear to have occurred subsequent to the increase of the tax from .04% to .125%, in 1991). Although the government has a legitimate interest in orderly and predictable tax administration, Justice O'Connor explained that "*McKesson* makes plain that equitable considerations are of limited significance once a constitutional violation is found." *American Trucking Ass'ns v. Smith,* 496 U.S. 167, 184 (1990). Any misplaced concern for visiting hardship upon the government by requiring a complete refund of the unconstitutionally exacted taxes is dispelled by the fact that at the end of fiscal year 1994, the fund generated by the Act contained a $453

million *surplus*,[6] while the total sums collected since the Act's inception amounted to $2.7 billion, $700 million of which was derived from unconstitutional export taxes. (Def's. Mem. Supp. Summ. J. at 5). Furthermore, the fund's cumulative surplus is expected to balloon to nearly $1.7 billion by the end of fiscal year 1999.[7] Under the circumstances, restitution of all unconstitutional exactions collected since the Act's implementation is appropriate where such relief is requested.

(Slip Op. 95–174)

SAMSUNG ELECTRONICS AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–04–00288

[Plaintiff's motion for summary judgment is denied. Defendant's cross-motion for summary judgment is granted. Judgment entered for defendant.]

(Dated October 26, 1995)

Irving A. Mandel; Jeffrey H. Pfeffer and *Thomas J. Kovarcik*, of counsel, for plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice *(Carla Garcia-Benitez)*; Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Mark G. Nackman)*, of counsel, for defendant.

MEMORANDUM AND ORDER

GOLDBERG, *Judge:* This matter is before the Court on the parties' cross-motions for summary judgment. Plaintiff, Samsung Electronics America, Inc. ("Samsung America"), asserts that the United States Customs Service ("Customs") incorrectly appraised the value of certain imported electronic articles. According to Samsung America, Customs' appraisal failed to account for the presence of latent defects, and the costs incurred to repair the defects. Defendant claims that Customs correctly appraised the subject imports. The Court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988), and grants defendant's motion for summary judgment.

BACKGROUND

Samsung Electronics Co., Ltd. ("Samsung Korea") sold certain televisions, stereos, video cassette recorders, microwave ovens, and other electronic articles to Samsung America. (Pl.'s Statement Pursuant to Rule 56(i) ("Pl.'s Undisputed Facts") at 1; Def.'s Resp. to Pl.'s State-

[6] Dept. of the Treasury, Financial Management Service, Funds Account Branch, Harbor Maintenance Trust Fund Income Statement and Balance Sheet, 10/1/93–9/30/94.

[7] Army Corps of Engineers Internal Briefing Outline (Feb. 2, 1995).

ment of Material Facts as to Which There Are No Issues to Be Tried ("Def.'s Resp.") at 1.) In conjunction with these sales, Samsung Korea and Samsung America entered into Servicing Agent Agreements ("Agreements"). (Pl.'s Mot. for Summ. J., Ex. 1.) In the Agreements, Samsung America recognized that the exported electronic articles would occasionally need repair, and Samsung Korea agreed to pay for any inspection, repair, refurbishing, or other customer requested services that Samsung America performed on the articles. *Id.* However, Samsung Korea limited the amount that it would pay per month to a maximum of five percent of the total amount of Samsung products imported into America during the relevant year. *Id.*

From 1987 to 1990, Samsung America imported the electronic articles that it purchased from Samsung Korea into the United States. (Pl.'s Undisputed Facts at 1; Def.'s Resp. at 1.) Customs assessed duties based upon the transaction value of the imports. Pursuant to 19 U.S.C. § 1401a (1988), Customs determined the transaction value of the imports using the price actually paid when Samsung America purchased the merchandise for exportation to the United States. (Compl. at 3; Answer at 2); *see also* part C, *supra* (discussing transaction value).

Samsung America claims that approximately 4.7 percent of the electronic articles contained latent manufacturing defects that were detected some time after importation. (Pl.'s Undisputed Facts at 1, 3.) According to Samsung America, whenever it discovered latent manufacturing defects, it either sold the merchandise in its defective condition at a discount or repaired the defective merchandise. (Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. ("Pl.'s Brief") at 5–6.) Samsung America then asserted its rights under the Agreements, and it received compensation from Samsung Korea either for the losses incurred as a result of the discounted sales, or for the costs incurred to repair the latent defects. *Id.*

DISCUSSION

A. *Burden of Proof:*

Customs' appraisal decisions enjoy a statutory presumption of correctness. 28 U.S.C § 2639(a)(1) (1988); *Moss Mfg. Co. v. United States*, 13 CIT 420, 424, 714 F. Supp. 1223, 1227 (1989), *aff'd*, 896 F.2d 535 (1990). Samsung America must overcome this presumption in order to prevail in this case.

B. *Allowance Pursuant to 19 C.F.R. § 158.12:*

Samsung America first argues that Customs should reduce the dutiable value of the merchandise at issue in this action pursuant to 19 C.F.R. § 158.12 (1990). According to Samsung America, section 158.12 authorizes a reduction in value because the merchandise possessed latent defects when it entered the United States. The Court does not agree.

The regulation that Samsung America relies upon in making its argument, 19 C.F.R. § 158.12, provides in pertinent part:

> Merchandise which is subject to ad valorem or compound duties and found by the district director to be partially damaged at the time of importation shall be appraised in its condition as imported, with an allowance made in the value to the extent of the damage.

Although the language of this regulation is broad, Customs contends that the regulation applies only when an importer receives merchandise that is of a lesser quality than that for which he contracted. (Mem. of Law in Supp. of Def.'s Cross-Mot. for Summ. J. at 22.) Customs' interpretation of its own regulation is entitled to deference, so long as it is reasonable. *Duty Free International, Inc. v. United States,* 19 CIT ____, ____, slip op. 95–88 at 8 (May 12, 1995).

Upon review, the Court finds that Customs' interpretation of 19 C.F.R. § 158.12 is reasonable. The reasonableness of Customs' interpretation is illustrated by the hypothetical case in which an importer buys irregular dresses, including dresses that are slightly torn or stained, from a foreign manufacturer with the intention of selling the dresses "as-is" at discount outlets. When the dresses enter the country, Customs may properly determine the value of the merchandise using the price paid when the importer purchased the dresses for exportation to the United States. Customs does not have to adjust the value of the dresses to account for tears or stains pursuant to 19 C.F.R. § 158.12. Indeed, a reduction in price would be inappropriate because the importer has received that for which he contracted, i.e. irregular dresses. *Esprit de Corp v. United States,* 17 CIT 195, 197–98, 817 F. Supp. 975, 977–78 (1993).

Having determined that 19 C.F.R. § 158.12 applies only when an importer receives merchandise that is of a lesser quality than that for which he contracted, the Court turns to consider whether the regulation authorizes a reduction in the value of the subject merchandise. When Samsung America purchased the subject merchandise from Samsung Korea, it did not contract only for defect-free merchandise. Samsung America also entered into the Agreements under which it received compensation for loss and repair costs resulting from defective merchandise. (Pl.'s Mot. for Summ. J., Ex.1.) Hence, Samsung America contracted to receive the following items from Samsung Korea: (1) defect-free merchandise; and (2) defective merchandise for which it had a contractual right to compensation for loss or repair. When the merchandise arrived in the United States, Samsung America received no less than that for which it had contracted. Consequently, the Court finds that 19 C.F.R. § 158.12 does not entitle Samsung America to a reduction in value.

C. *Allowance Pursuant to 19 U.S.C. § 1401a(b)(3)(A)(i):*

Samsung America next argues that Customs should deduct costs incurred to repair latent defects in the subject merchandise from the transaction value of the merchandise pursuant to 19 U.S.C.

§ 1401a(b)(3)(A)(i) (1988). According to Samsung America, section 1401a(b)(3)(A)(i) authorizes a deduction because the costs incurred to repair the merchandise constitute post-importation maintenance costs. Assuming, without deciding, that the costs incurred to repair latent defects can be considered maintenance costs, the Court rejects Samsung America's argument.[1]

In general terms, transaction value is an appraisal for duty purposes that is based upon the price paid for imported merchandise to or for the benefit of the seller, subject to specifically enumerated additions and deductions. *Moss Mfg. Co. v. United States*, 8 Fed. Cir. (T) 40, 44, 896 F.2d 535, 539 (1990). The statute cited by Samsung America, 19 U.S.C. § 1401a(b)(3)(A)(i) (1988), does not require Customs to deduct all post-importation maintenance costs from transaction value. Rather, the statute provides:

> (3) The transaction value of imported merchandise does not include any of the following, if identified separately from the price actually paid or payable * * *:
>
> (A) Any reasonable cost or charge that is incurred for—
>
> (i) the * * * maintenance of * * * the merchandise after its importation into the United States * * *.

Hence, the statute requires an importer to identify any charge incurred for post-importation maintenance, apart from the price charged for merchandise, in order to prevent such costs from being included in the transaction value of the merchandise.

The application of 19 U.S.C. § 1401a(b)(3)(A)(i) is illustrated by the following example. Assume that a U.S. importer purchases a photo copier under a sales contract that provides for a breakdown of costs, and that the total contract price includes separately identified costs for post-importation maintenance. *See* 19 C.F.R. 152.103(i) (1990) (discussing separately identified costs for technical assistance). Upon entry of the merchandise, Customs can see that the buyer has incurred costs in advance for post-importation maintenance, and Customs can distinguish this amount from the price that the buyer actually paid for the merchandise. Customs can then exclude the amount attributable to post-importation maintenance from the transaction value of the merchandise pursuant to section 1401a(b)(3)(A)(i). *Id.*

The statute would not, however, apply in the situation where a U.S. importer purchases a photo copier under a contract that fails to provide for post-importation maintenance. In such a case, the importer neither incurs, nor separately identifies, any costs for post-importation maintenance when it purchases the merchandise. Upon entry of the equipment, Customs can simply determine the transaction value of the merchandise using the price that the importer actually paid for it. If the importer incurs maintenance costs after importation of the merchan-

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[1] The parties disagree as to whether or not the costs incurred to repair the Samsung products constitute maintenance costs within the meaning of 19 U.S.C. § 1401a(b)(3)(A)(i). However, the Court does not need to address this issue in order to resolve the parties' motions for summary judgment.

dise, Customs is under no obligation to deduct the costs from the transaction value of the merchandise pursuant to section 1401a(b)(3)(A)(i). Indeed, such an obligation would lead to absurd results because the costs of maintaining a complex piece of equipment such as a photo copier could eventually exceed the transaction value of the merchandise.

This case resembles the second situation, in which the 19 U.S.C. § 1401a(b)(3)(A)(i) does not apply. The evidence fails to show that Samsung America paid for the imports under a sales contract that provided for a breakdown of costs, and that the total price paid included separately identified costs incurred for post-importation maintenance. Instead, the evidence shows that Samsung America did not incur, and consequently could not identify, the alleged post-importation maintenance costs when it purchased the subject merchandise. Indeed, Samsung America admits that it did not incur repair costs until after the importation of the merchandise, when it discovered the alleged defects. (Pl.'s Brief at 5–6.) Upon review, the Court finds that Customs has correctly determined the transaction value of the subject imports using the price that Samsung America actually paid for them, and that section 1401a(b)(3)(A)(i) does not apply.

CONCLUSION

For all of the foregoing reasons, the Court concludes that Samsung America has failed to rebut the presumption of correctness in favor of defendant, and that defendant is entitled to judgment as a matter of law. Wherefore, it is hereby

ORDERED that plaintiff's motion for summary judgment is DENIED; and it is further

ORDERED that defendant's motion for summary judgment is GRANTED.

(Slip Op. 95–175)

MICRON TECHNOLOGY, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND HYUNDAI ELECTRONICS INDUSTRIES CO., LTD., ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 93–06–00318

(Dated October 27, 1995)

JUDGMENT

GOLDBERG, *Judge:* As the United States Department of Commerce ("Commerce") has complied with the decisions that the Court made in Slip Op. 95–107, and there being no further objections, Commerce's August 24, 1995 remand determination is hereby affirmed. The reasoning of Slip Op. 95–107 is incorporated herein by reference.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C95/73 10/25/95 Carman, J.	Alcan Aluminium Limited	94–01–0039	8309.90.00 4% and merchandise processing fee (MPF) at the rate of 0.19% 8309.90.005.2% and MPF at the rate of 0.19%	CA 8309.90.00 3.1% and MPF at the rate of 0.076% (1992) CA 8300.90.00 2.6% and MPF at the rate of 0.038% (1993)	Agreed statement of facts	Port: Not stated Retortable aluminum pet food can lids

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